Jurisdictional Statement

81-158

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In The
SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. .....

MICHAEL PAPADOPOULOS, Ph.D.,
Plaintiff- Appellant,

vs.

OREGON STATE BOARD OF
HIGHER EDUCATION,
Defendant-Appellee.

ON APPEAL FROM THE COURT OF APPEALS
of the
STATE OF OREGON

JURISDICTIONAL STATEMENT

Michael Papadopoulos Ph.D.,

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Acting for himself.

QUESTIONS PRESENTED

1. Whether, pursuant to 28 USC Section 1738 and this Court's decision in *Stoll v. Gottlieb, 305 US 165 (1938)*, a state court may refuse full faith and credit to the prior judgment of the federal court in the same state because that judgment impinges on the state court's view of its own jurisdiction in the case.

2. Whether the court below may recognize that a class of public employes may hold enforceable contracts entitling them to continued public employment and yet rule that such contracts are excluded from the protection of the Fourteenth Amendment's Due Process clause.

3. Whether, puruant to the U.S. Constitution's Fourteenth Amendment and this Court's decision in *Carey v. Piphus, 435*

US 247 (1978), the established and unjustified violation of the appellant's right to the protection of the Fourteenth Amendment's Due Process clause entitles him to opportunity to plead and prove the full extent of his compensable injury, including distress, caused by that violation, when trial has yet to be had on remand on the issue of damages.

4. Whether the appellate court's act taken under its statutory power to make and enforce rules for the remand of causes to a lower court may involve such exercize of the state's legislative power as to constitute a law for the purpose of the U.S. Constitution's Due Process Clause, and whether such exercise is void under the Contract Clause, or under the Due Process Clause where, in the circumstances of this case the effect of that act is to bar access to the available judicial machi-

nery already invoked and thereby to impair the obligations of contract by barring the enforcement of contractual agreements.

5. Whether the appellant has been denied access to the judicial machinery already available and invoked in this case and in any manner or for any reason violative of his rights under the First Amendment and the Fourteenth Amendment to the U.S. Constitution.

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The final opinion of the Oregon Court of Appeals in this case is reported at 48 Or App 739, 617 P2d 931 (1980). *See A-1.* The initial opinion of the Oregon Court of Appeals in this case is reported at 14 Or App 130, 511 P2d 854 (1973). *See A-15.*

The Circuit Court for Marion County, trial court below, entered no opinion relative either to its initial judgment or its final judgment on remand. *See Judgments at A-13, A-64.* The trial court stated its opinion from the bench in relation to denial of appellant's Motion to Amend Pleadings, *see A-62,* and it issued a letter-opinion, *see A-65,* relative to the denial of appellant's post-judgment motions. No trial court decision or opinion is reported.

The administrative agency below, appellee herein, issued an initial

pre-litigation opinion, *see* A-7, and a second opinion after remand. *See* A-11. No administrative decision or opinion is reported.

STATEMENT OF JURISDICTION

Michael Papadopoulos appeals from the judgment entered by the Oregon Court of Appeals on October 13,1980, both as to its affirmance of the final judgment of the trial court and as to its refusal to reconsider its own prior decision in the same case. *See* A-85, A-15. Appellant having petitioned the Oregon Supreme Court, the highest court of the state in which decision could be had, for review, that court denied review on March 31,1981. *See* A-85,A-86.

Notice of appeal was filed in the Oregon Court of Appeals on May 28, 1981, *see* A-86, within 90 days of denial of review by the Oregon Supreme Court.

The jurisdiction of this Court is

invoked under *28 USC Section 1257(2)*, or, if appeal is improvidently taken, jurisdiction is invoked under *28 USC Section 2103*.

LATE DOCKETING

It was appellant's duty to docket this appeal no later than June 29,1981, which was 90 days after the denial of review by the Oregon Supreme Court. *See Rule 12*. On June 24,1981, typewriter breakdown which took two days to repair made it impossible for appellant to have the printing completed in time for a timely filing by mail, *see Rule 28.2*, Appellant in fact deposited his Jurisdictional Statement in a U.S Post Office with first-class postage fully prepaid, and together with his affidavit of having served three copies thereof on the appellee, on July 1, 1981, i.e. 92 days after the denial of review by the Oregon Sup-

reme Court. Appellant's Jurisdictional Statement was returned to him for failure to comply with provisions of Rule 33, and was received by him on July 15, 1981. Appellant herewith submits his new and proper Jurisdictional Statement in prompt compliance with the Rule.

CONSTITUTIONAL PROVISIONS

Article 1, Section 10:

> "No state shall * * * pass any * * * law impairing the obligation of contract."

Amendment I:

> " Congress shall make no law * * * abridging * * *the right * * * to petition the government for a redress of grievances."

Amendment XIV:

> " * * *; nor shall any state deprive any person of life,liberty or property without due process of law; nor deny to any person * * * the equal protection of the law."

STATUTORY PROVISION

Title 28, USC Section 1738:

> " * * *. The records and judicial proceedings of any * * * State, or copies thereof * * *shal have the same full faith and credit in every court within the United States * * * as they have by law or usage in the courts of such State * * *from which they are taken."

STATEMENT OF THE CASE

The appellant, Michael Papadopoulos, is a professor of mathematics. His appointment to a position under the appellee Board of Higher Education and his employment as a full professor at Oregon State University was terminated in 1970.

Many of the relevant facts relating to the appellant's appointment and his employment as professor, and the termination of his appointment and of his employment, have been described by the Oregon Court of Appeals in its initial opinion in this case. *See A-16 through A-34; Papadopoulos v. Bd. of Higher Ed.,*

14 Or App 130, at 135-153, 511 P2d 854 (1973). The facts pertinent to this appeal are stated here.

After the appellant Michael Papadopoulos had undergone favorable review by his department for a change in his appointment status, he was told by lower university officials that his appointment would not be renewed after the end of the 1969-70 academic year. He initiated internal review procedures but the university president refused to accede to the favorable result of those reviews. His statement that

> " * * *(we) find no sound reason for reversing the recommendation of the School of Science. The Dean of Science has reported the reason for his decision to us, namely, the judgment that your professional record failed to demonstrate the degree of scholarly performance expected of a full professor in the School of Science."

was published in the staff newsletter and was released to the news media in relation to the prospective termination

of the appellant's employment.

The appellant Papadopoulos appealed to the Board of Education. The Board notified him of the time and place of a hearing limited to the three questions:

> " 1. Whether you received appropriate notice of termination of employment as required by the Administrative Code;
>
> 2. Whether you had been considered for indefinite tenure in accordance with the Board's Administrative Code; and,
>
> 3. Whether there was ever any commitment, binding upon the Department of Higher Education, to you concerning indefinite tenure. "

See at A-8, *infra*. After the resulting hearing the Board concluded, *see* A-9, that there was no binding commitment and that proper procedures had been followed.

Papadopoulos initiated proceedings in the Marion County circuit court. He claimed that the appellee Board was subject to Oregon's Administrative procedures Act, ORS ch 183, that he was entitled under that Act to a 'contested case' be-

fore the Board could decide to terminate his appointment and his employment, that the hearing already held did not conform to the statutory form required of contested cases, that the hearing already held was not preceeded by a statement of the reasons for the termination of his appointment and his employment, and that his entitlement to a 'contested case' was based on his entitlement to Due Process under the Fourteenth Amendment to the U.S. Constitution.

Although his pleading was couched in the form of a Petition for Judicial Review of Administrative Action, the pleading also alleged facts and presented claims to relief which only a court of general jurisdiction could grant. Appellant invoked the circuit court's powers as an equity court to pray for various forms of relief in the form of injunction, reinstatement, restitution and such other relief might seem to the court equitable over and beyond whatever relief

was available and within the court's power to grant under the Administrative Procedures Act. *See Trial Court Record - 2nd Amended Petition.* While under that Act, *ORS 183.480(2) (1969)*, no pleading in response to a petition for judicial review is required of an administrative body, the Board in fact filed its Answer on September 2, 1970, *see Trial Court Record*, placing both administrative and non-administrative matters at issue before the trial court.

The 1970-71 academic year began on September 16, 1970. That was the first day on which the appellant Papadopoulos was denied employment to which he claimed an enforceable right. A trial was had before the court in November, 1970, one limited to the Board's defense that its

> " * * *actions in relation to the non-renewal of petitioner's yearly appointment * * * are not subject to judicial review

under ORS 183.480 * * *."
(*Trial Court Record -Answer*)

This defense was overruled. The court's decision as to this defense was to remand to the appellee Board for the taking of further evidence under proper notice and at a hearing conducted in accord with prescribed provisions of the Administrative Procedures Act, i.e.

" * * * under the conditions imposed in ORS 183.420, 183.440, 183.450 and 183.480(5)."

See A-10.

The Board's appeal from this Order having been dismissed, the Board conducted a four-day hearing in June of 1971; it did not provide notice that issues other than those originally set for Board consideration, *see A-8, infra*, would be considered and adjudicated by the appellee Board. It was the Board's September 1971 conclusion, *see A-11*, that the decisions of the subordinate Oregon State University

> "* * *not to grant indefinite tenure to Dr. Papadopoulos and not to renew his academic appointment are affirmed."

The Board made Findings, see A-12, that the decision of the subordinate university administration

> " * * * complied with procedural due process in all respects."

and was not based

> " * * *on any conduct protected by the constitution and laws of the United States and the State of Oregon."

but that there was

> " * * *substantial evidence to justify the finding by the administration at Oregon State University that Dr. Papadopoulos did not comply with the standards of Oregon State University School of Science for production of scholarly research."

The Board's Findings and Conclusion were forwarded with the administrative hearing record to the circuit court, where the appellee Board sought to have the administrative matters dismissed for lack of subject matter jurisdiction. In February 1972 the circuit court overruled the Board's motion and, without

hearing argument or receiving briefs on judicial review, the circuit court entered its judgment on review of the appellee Board's administrative order. *See at* A-13, *infra*. By that judgment in affirmance of the Board's decision, *see at* A-11, *infra*, nothing was stated as to the non-administrative issues that were at issue before the court.

While it was the judgment of the circuit court

> " * * *that the administrative order of the defendant (Board) affirming the action of Oregon State University in refusing to renew Plaintiff's contract and refusing to grant Plaintiff tenure is affirmed." *see* A-13, *infra*,

the circuit court based on the admin- administrative record its findings that "there was no denial of Due Process" and that the action of Oregon State University was based on the appellant's "academic record and not * * *on constitutionally permissible conduct.", *see* A-14, *infra*.

The appellant Papadopoulos appealed from this administrative judgment without awaiting trial and judicial resolution of the non-administrative matters at issue on the pleadings. By his brief on appeal, the appellant's principal claim was that the appellee Board's findings and conclusion, *see at A-11 infra*, was not entered in compliance with the applicable statutory provisions because they were incomplete, conclusory, deficient in underlying facts and thus insufficient to advise a reviewing court of the ultimate facts to which the law is applied.

The appellee Board cross-appealed from the judgment that Papadopoulos was entitled to a hearing on the reasons for his discharge.

The Oregon Court of Appeals took jurisdiction of the appeal, and issued its initial opinion. *See at A-15, infra.*

The Oregon Court of Appeals held that on that initial appeal

> " * * *the dispositive issue is whether petitioner was entitled to a hearing before being discharged effective June 1970."

See at A-16, infra. That issue was examined and was determined in the favor of the appellant Papadopoulos; the Board did not accordingly prevail on its cross-appeal.

With this Court's recent decisions in *Bd. of Regents v. Roth, 408 US 564 (1972)* and *Perry v. Sindermann, 408 US 593 (1972)* before it, the Court of Appeals declared that in Oregon:

> " * * *public employe tenure rights arise solely from statutes or, in the case of the Board, regu;ations adopted pursuant to a statutory delegation of authority. * * *. It is these tenure rights based on statute or regulation that create property interests that cannot be withdrawn without a due process hearing. Employment contracts of public employes may create rights to continued employment over and above that provided by statute or regulation. <u>But such an employment contract, standing alone, does not trigger the kind of interest that triggers the require-</u>

ment of a due process hearing before the government withdraws the benefits of the contract, i.e. breaches it. * * *." (emphasis added)

See at A-49, infra.

The Oregon Court of Appeals went on to find that because the appellant Papadopoulos had not been given timely notice of the termination of his appointment, the Board's regulations created for him an automatic entitlement to an appointment for the 1970-71 year, so that

> " * * *the Board was required by the constitution to accord petitioner a hearing when it sought to discharge him * * *."

See at A-57, infra.

The Court of Appeals stated that

> " * * *(since) a hearing was required by the constitution, the Administrative Procedures Act, ORS ch 183, required that the hearing should be a contested case hearing conducted in accordance with the requirements of the Administrative Procedures Act. * * *.
>
> In spite of petitioner's entitlement to continued employment * * * the Board discharged him effective June 19770. It did not accord petitioner a proper hearing before doing so. * * *.

> " * * *(The)Board's 1970 discharge of petitioner was in violation of his constitutional right to a hearing before being deprived of his property interest in continued employment until June 1971, and in violation of his right under the Administrative Procedures Act that such a hearing be conducted in accordance with that statute."

See A-58 infra.

The Oregon Court of Appeals then turned to the question of petitioner's redress. It stated:

> " * * *Normally, a public employe discharged in a manner that violates the employe's rights to a pre-termination hearing would be entitled to reinstatement * * * for the period of the employe's entitlement to continued employment under relevant statutes and regulations. Here, petitioner's entitlement * * * ended in June 1971. Since that date has long since passed, reinstatement is not the appropriate remedy in this case.
>
> " Instead, it appears that petitioner is entitled to money damages in the form of what his salary would have been for the 1970-71 academic year less the amounts he did earn or reasonably could have earned during that period (*Citation omitted*)This would be the natural result of application of the principle that the victim of an unconstitutional act is entitled to be restored to that which he lost. *Cf. Bivens v. Six Unknown*

> *Fed.Narc.Agents 403 US 388(1971).* However * * * we have not had the benefit of full argument on the remedy issue, and there is no evidence in the record on petitioner's mitigation * * *. Therefore, upon remand the circuit court will explore and * * * hear evidence on the remedy issue. In the unusual circumstances of this case we believe the circuit court has authority to do so under the terms of ORS 183.480(6) (1969).

See at A-58 infra. This statement of belief was supplemented by footnote recitation of the language of ORS 183.480(6) (1969) and by a statement of the well-known rules that:

> " Once a court of equity acquires jurisdiction, it can award complete relief. * * * . Even if equitable relief is denied, money damages can be awarded. (Citations omitted).

See at A-59 infra. In final summary the Court of Appeals stated:

> " * * *(We) hold:(1) The notice of termination * * *petitioner received was too tardy * * * to terminate petitioner's employment effective June 1970; (2) therefore * * * petitioner had an expectation of continued employment until June 1971; (3) petitioner's expectation of

> continued employment was a property interest * * * he could not be deprived of continued employment * * * without a pretermination hearing; (4) such a hearing had to comply with the requirements of the Administrative Procedures Act, ORS ch 183; (5) petitioner was not accorded a pretermination hearing that complied with * * *(that) Act. Thus, to the extent that the circuit ocurt affirmed the petitioner's discharge effective June 1970, that determination is reversed and remanded for further proceedings on petitioner's damages for the 1970-71 year. In all other respects the circuit court's decision is affirmed "

See at A-60 infra.

Review of this decision by the Oregon Supreme Court was denied and this Court denied certiorari. *Papadopoulos v. Bd. of Higher Ed., 417 US 919 (1974).*

While the matter was pending on remand from the Oregon Court of Appeals,in June 1975 appellant Papadopoulos filed a civil rights action in the U.S. District Court for Oregon under 42 USC Sections 1983 and 1985. He named and served multiple defendants, the appellee Board being one so named and served, and he invoked federal jurisdiction

diversity as well as other forms authorized under federal law.

All the defendants including the appellee moved for a summary judgment and by their motion and supporting matter urged the federal court to find the federal action barred by res judicata - collateral estoppel. The federal court took jurisdiction, and with evidence relating to the proceedings previously had in the state's courts in this case before it the federal court concluded that the appellant Papadopoulos was seeking to relitigate his case by reasserting

> " * * *issues already determined or issues he should have raised in his administrative or judicial hearings. * * *."

and that " res judicata - collateral estoppel" was applicable. The court considered no other issue. *See Federal Opinion, A-69 at A-76, infra.* Based on the federal opinion the action was dismissed. *See A-77, infra.* Even though the record

showed that proceedings were pending and the case in the state courts had not reached finality, the Ninth Circuit Court of Appeals affirmed, *see Appellate Opinion A-78 at A-79, infra,* and this Court denied certiorari. 434 US 1069 (1978). *See A-80, infra.*

The appellant made a further attempt to preserve his constitutional and other damage claims in an independent proceeding in the Multnomah County circuit court. The multiple defendants, again including the appellee Board, again maintained that those claims either had been or should have been brought in the initial state proceeding in the instant case, again raised the issue of res judicata - collateral estoppel and again persuaded the court to dismiss the action. *See Order in Second Companion Case, A-80 at A-84 infra.*

The appellant revived the proceeding on remand from the Oregon Court of Appeals

both as to the yet-undetermined non-administrative matters remaining at issue in the circuit court and as to the damages issue for which remand had been ordered. He moved for leave to amend the pleadings, and he placed before the circuit court the evidence of the federal and the Multnomah County judgments that had been entered between the parties since the Oregon Court of Appeals had entered its initial judgment in the case. *See A-60, infra.* Papadopoulos made express claim for the right to plead and prove with specificity the injuries he suffered and the relief which he claimed for the appellee Board's already-established violation of his Due Process rights. He also sought to assert a claim of right to jury trial as to the extent of his injuries and the compensation therefor, all such assertions being within the scope of the

Court of Appeals' mandate that

> " * * *on remand,the circuit court will explore and * * * hear evidence on the remedy issue. "

See at A-59, infra.

But the circuit court denied leave to amend for the reason that

> " * * *the only thing left for this Court to do in this case is as directed (in the opinion of the Court of Appeals, and) to determine what Dr. Papadopoulos' salary would have been in 1970-71 academic year, less what he did or reasonably could have earned. * * *"

See Transcript at A-63,infra.

On July 6,1979 a judgment was entered in the amount of $18333 in favor of the appellant Papadopoulos "as money damages for the academic year including his usual summer employment." *See A-65,infra.*

On July 13,1979, the appellant Papadopoulos moved to reopen the case. In addition to seeking leave to offer new evidence , material and favorable to him which had been kept from him by the Board in the administrative hearing,

and he also sought to offer testimony

> "* * *material to issues arising on the pleadings which have not been heretofor tried and decided * * *."

See Trial Court Record - Motion to Reopen.

The trial court denied the motion, apparently for the reason that the appellant Papadopoulos had exhausted his remedies. *See Post Judgment Opinion A-65 at A-66 infra.*

The appellant appealed both the July 6,1979 judgment, *see A-64*, and from the post-judgment order in denial of his motions to reopen and to reconsider, *see A-68 infra.*

The issue of the intervening federal judgment, *see A-77*, as being res judicata as to the scope of the proceedings below in this case was raised by placing evidence of that judgment both before the trial court and before the Oregon Court of Appeals in Appendix form, and by duly certi-

fied copy. The res judicata issue was briefed before the Court of Appeals and was not responded to by the appellee Board. The question was also placed before the Oregon Supreme Court for review. The circuit court refused to consider the matter out of obedience to the mandate, the Court of Appeals declared the federal judgment to be mistaken, and the Oregon Supreme Court denied review.

In his second appeal from the judgment of an equity court, the appellant Papadopoulos raised all the federal constitutional issues now placed before this Court in his appellate briefs. The Court of Appeals considered all issues and declared them to be without merit, or not before the court in an administrative proceeding, *See A-1 at A-2,A-4*, except for the issue of costs and interest not placed before this Court for review. All federal constitutional

issues were placed before the Oregon Supreme Court by petition for review. Review was denied.

The issue of the validity under the U.S. Constitution of the unanticipated legislative act of the Oregon Court of Appeals in this case has not bee raised previously.

SUMMARY OF ARGUMENT

The appellant Papadopoulos claims that in addition to matters arising under administrative law various non-administrative matters were at issue in the trial court on which there has been no opportunity for trial and no express adjudication. He also claims that remand to a court of equity for exploration of the issue of remedy for the already-established violation of his right to due process under the Fourteenth Amendment carries with it

the right to prove the full extent of the compensable injury caused by such violation and, if necessary, to amend and supplement the pleadings so as to raise that issue prior to trial.

In its second decision herein the Oregon Court of Appeals holds this to be a strictly administrative proceeding; it declares that a prior inconsistent federal judgment is mistaken and thereby violates the 'full faith and credit' principle. For this reason alone the judgment below should be vacated or reversed and the Oregon Court of Appeals required to integrate the prior federal judgment with the other facts of the case.

The holding of the Court of Appeals also violates the U.S. Constitution in a number of ways impinging on the appellant's access to the courts below. Thus, where the State of Oregon created the appellee Board with the power to make

contracts and with the power to sue and be sued, the Court of Appeals judgment in this case contains an implied legislative act impairing the obligation of contract or, in the alternative, is an adjudication which violates the right to procedures for the enforcement of contract.

The judgment below is additionally in violation of the principle that the appellant must be able to invoke the existing jurisdiction of the courts for opportunity to prove his allegations of infringement of his rights under the federal constitution. No constitutional authority provides that the courts may delegate judicial powers so that appellant's First Amendment claims could have been heard and decided by an administrative agency, the appellee Board.

THE QUESTIONS ARE SUBSTANTIAL

1. The 'Full Faith and Credit' principle obliges the Oregon Court of Appeals to decide the case in a manner consistent with the judgment previously entered between the same parties by the federal court in Oregon.

The appellant Papadopoulos filed a companion civil rights action in the U.S. District Court for the District of Oregon in June, 1975, at a time well within the six-year statute of limitations applicable to such actions in Oregon. *Clark v. Musick, 623 F2d 89 (9th Cir 1980)*. The appellee Board was one among the multiple adverse parties who brought the federal court to accept the view that the proceedings already had in the courts below in this case were not just administrative proceedings. It was necessary to the federal judgment, *see A-69 et seq, infra*, that jurisdiction had attached in the Marion County Circuit

Court below in this case by which that Court had power to determine all the causes later submitted to the federal court for decision. Since the federal judgment was unquestionably valid, and since it was duly placed as evidence before the courts below, and was noticed by them, it is clear that the federal judgment must be integrated with the judgment in this case, *28 USC Section 1738*, even if it is mistaken. *Dowell v. Applegate, 152 US 327,14 SCt 611,618 (1894) reversing 24 Or 440, 33 P 937(1893); Stoll v. Gottlieb, 305 US 165,170(1938).*

If the 'full faith and credit' principle enacted by the Congress and construed by this Court does not apply where a prior federal judgment impinges on a state court's view of its own jurisdiction in a case, the framing of such an exception to the general rule deserves plenary consideration by this Court.Such

consideration will ensure full judicial examination of the federal policy involved.

This matter does not require independent examination of Oregon's law. The record below shows that the federal court's view of the scope of proceedings below is a correct application of the decisions of the Oregon Supreme Court. The appellant Papadopoulos had invoked the jurisdiction of the Marion County circuit court over both equitable and administrative claims, and the appellee Board, not required to file responsive pleadings in an administrative proceeding, see ORS 183.480(2) (1969) in fact filed responsive pleadings and thereby submitted itself completely to that court, over any cause of action and wherever arising. *Belknap v. Charlton*, 25 Or 41,46 31 P 758 (1893); ORS 14.030. Nor can it be claimed that the U.S. District judge lacked familiarity with Oregon's law. Cf. *Bishop v. Wood*, 426 US 341,345(1976).

Thus, if the state court may not deviate from the 'full faith and credit' principle in this case, the record contains plain error, and the case need not even be set on the Court's calendar for oral argument. This Court should reverse the judgment below with instructions to have the case remanded for trial and judicial determination of the appellant's non-administrative claims against the appellee Board.

2. The basic decision of the Court of Appeals in this case does not conform to this Court's decisions in *Bd. of Regents v. Roth, 408 US 341 (1972), Perry v. Sindermann, 408 US 593 (1972)* and to its subsequent interpretations of the scope of the Fourteenth Amendment's Due Process clause.

The Oregon Court of Appeals has acted in this case to take the Due Process Clause

out of the employment contracts of a class of Oregon public employes, and it has misread and misapplied this Court's decisions in so doing.

In its initial decision in this case the Court of Appeals stated that

> " * * *Employment contracts of public employes may create rights to continued employment over and above that provided by statute or regulation. But such an employment contract * * * does not create the kind of interest that triggers the requirement of a due process hearing before the government withdraws the benefit of the contract, i.e. breaches it. In such a situation the public employes' remedies are measured by the law of contracts, * * *."

See at A-49, infra.

This Court holds uniformly that the Due Process clause extends procedural safeguards to interests "that stem from an independent source such as state law." *Bd. of Regents v. Roth, 408 US 564 577 (1972). See Memphis Light, Gas & Water Div., v. Craft, 436 US 1,9 (1978); Bishop v. Wood, 426 US 341,344 (1976); Perry v.*

Sindermann, 408 US 593,602 (1972). The public employe with an employment contract which creates the right to continued employment "over and above that provided by statute or regulation", clearly has a legitimate claim of entitlement under state law, *see Perry v. Sindermann, 408 US at 601-602,* because such a contract must be based on some mutually explicit understanding to be enforceable. *Bishop v. Wood, 426 US at 345.* In such a case the Due Process clause requires the discharge of a public employe to be preceded by opportunity for him to contest with the employer the basis for the proposed discharge. *Fuentes v. Shevin, 407 US 67.81 (1972); Carey v. Piphus, 435 US 247,259 (1978).*

In Oregon, then, it is possible for the public employe to have an enforceable right to continued employment beyond that created by statute or administrative

rule. *See at* A-49. Where the employer is statutorily authorized to make contracts, such contracts will incorporate the existing law by implication, *5 Corbin, Contracts, Section 551*, and will, accordingly, incorporate not only the right to judicial enforment that is expressed in the state's law of contracts, but also the constitutionally mandated procedures to protect against the mistaken or unjustified breach of the right to continued employment. *See Carey v. Piphus, 435 US 247 at 259*. The Court of Appeals denies the existence of such constitutional rights in its analysis of this Court's decisions, and it has refused opportunity to correct that error by denying the appellant's request to reconsider its initial opinion and decision in this case as part of the second appeal. The issue was material on second appeal because of the effect of that decision was extended to the question of compensation.

Where a public employment contract creates

a right to continued employment which incorporates both an entitlement based on statute and an entitlement based on the mutual understandings recognized as binding under the state's law of contracts. the Court of Appeals in effect treats a single contract as consisting of parts only one of which is deemed to be protected by the Due Process clause.

It states expressly that only that part is constitutionally protected which involves a right to continued employment based on statute or regulation, *see at* A-49, *infra*. And although it recognizes that "the victim of an unconstitutional act is entitled to be restored to that which he lost." *see at* A-59, *infra*, it applies that principle by limiting the compensation for the unconstitutional breach of an employment contract to compensation for the part of the contract based on statute or regulation.

The question of the appellant's right to continued employment based on contract going beyond the one-year entitlement based on the appellee's regulations, *see at* A-57, *infra*, is open.

In the first place the appellant alleged such a right in the pleadings, and brought the appellee Board before the trial court in its corporate status; in ORS 352.240 the state legislature constituted the Board a corporation

> " * * *with power to sue and be sued, (and) to make contracts, * * *."

The state has therefore authorized the making of an employment contract, and has also authorized the enforcement of the terms of such contract in the state's courts.

In the second place the question of determining the terms of the appellant's employment contract was immaterial to

the determination of his right to a pre-discharge hearing. As long as the appellant held any property interest in continued employment, his constitutional right to a pre-discharge hearing triggred the state-created right to a contested case hearing under the Oregon Administrative Procedures Act without regard to the nature and extent of that interest in property. ORS 183.310(2) (1969). *See at A-37, infra.*

In the third place there has been no trial and no judicial determination of the extent of the appellant's enforceable interest in continued employment under the appellee Board. The appellant persuaded the trial court of his entitlement to due process on the pleadings alone, and the Court of Appeals confirmed that entitlement. And because the Court of Appeals excluded contract as a source of the right to due process, *see A-49, infra,* the initial Court of Appeals decision

may not imply that the right of the appellant Papadopoulos to continued employment is limited to the one-year right based on the appellee Board's regulations.

The judgment below does not conform to this Court's decisions relating to the Due Process clause. It deserves this Court's plenary consideration because the judgment below affects the constitutional and the contractual rights of any Oregon public employe whose employment is capable of being governed by contract. Since the error is apparent on the face of the Court of Appeals' opinion, *see at A-49 infra*, and has affected the judgment below, the matter need not be placed on this Court's calendar for oral argument. This Court should reverse the judgment below with instructions to provide the appellant Papadopoulos with opportunity to prove his contract claims, and with opportunity to amend and supplement the

as authorized by state law and civil procedure rules.

3. The damages remedy available for the violation of rights protected by the Due Process clause requires that the appellant have opportunity to plead and prove the full extent of the compensable injury he suffered by reason of the violation.

Even though proceedings for determination, on remand, of the money damages for the established violation of the appellant's Due Process rights were held before a court of equity, capable of granting full relief, *see at* A-59, *infra*, the appellant Papadopoulos has been foreclosed by the Court of Appeals from opportunity to plead and prove the extent of the injury actually caused by that violation.

The initial pleadings were filed, and

responded to before September 16, 1970, *see Trial Court record*, i.e. before the time had passed in which the appellee Board was required by constitution to provide the appellant with the reasons for a proposed discharge and with opportunity to prove those reasons to be mistaken or unjustified. *Cf. Carey v. Piphus, 435 US 247, 259 (1978)*

Only after the appellant was denied employment to which he had an enforceable right could he allege any facts to state a claim of injury resulting from the violation of his right to a pre-discharge hearing; the right to damages did not accrue until after the issues had been placed before the trial court for decision.

And only after the Court of Appeals entered its initial decision in this case did this Court determine that the unjustified violation of the right to Due Process is capable of causing actual injury which is compensable. *Carey v. Piphus, supra, 435*

US 247 at 259-264.

The appellant's motion for leave to amend the pleadings was denied by the trial court solely because amendment was not authorized by the Court of Appeals' initial opinion. *See at A-62, infra.* The Court of Appeals agreed. *See at A-4. infra.*

This Court holds that the class of litigants who allege a violation of their own constitutional rights

> " * * * must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights." *Davis v. Passman, 442 US 228,242(1979)*

Had this been no more than an administrative proceeding as the Court of Appeals continues to hold, *see at A-4, infra,* it is doubtful if jurisdiction could be invoked in this case for the award of damages for the actual injury caused by the violation of the appellant's due process rights. As previously argued *supra*, however, the trial court's equity jurisdict-

ion had been invoked by the appellant Papadopoulos, and had been submitted to by the appellee Board long before the Court of Appeals remanded the case to a court of equity, *see at* A-59, *infra*, for exploration of the issue of remedy and for award of damages. Also as argued *supra*, the judgment that there was in the courts below the jurisdiction to determine the appellant's civil rights claims is res judicata as to that question.

Nor is there any question about the availability under state law of procedures for placing the issue of the appellant's right to compensation for the violation of his right to due process before the trial court in this case. Trial was yet to be had on remand when the appellant moved to amend the pleadings. Such amendment before trial was authorized by the

statutes, while the Oregon Supreme Court has long held that because the purpose of pleadings is to enable parties to bring their controversies to trial on the merits, amendment of pleadings is intended by law to allow the cure of defects even after an appeal in which remand is ordered for further proceedings and trial. *Ross v. Robinson, 174 Or 25,45, 145 P2d 204 (1944); Lieuallen v. Mosgrove, 37 Or 446, 61 P 1022 (1900).*

The judgment below denies the appellant opportunity to plead and prove his injuries caused by violation of his Due Process rights. This judgment is not consistent with this Court's decisions dealing with the award of damages for injuries caused by such violations, and neither serves the constitutionally-mandated policy of minimizing unfair or mistaken property deprivations by the state, nor the policy of deterring such deprivation. For such

policy reasons this Court should give plenary consideration to the case. Because the error is, however, plain on the face of the judgment and opinions below, the case need not be set on the Court's calendar for oral argument. This Court should reverse the judgment below with instruction to opportunity for the appellant Papadopoulos to plead and prove his injury resulting from the denial of due process.

4. The Court of Appeals' statutory power to make rules governing the remand of causes to the lower courts involves exercise of the state's legislative power, and, in the circumstances of this case, is a source of contract impairment for the purpose of the Contract clause of the U.S.Constitution.

Oregon's Court of Appeals is a court created by statute and is limited to the exercise of statutory powers; there is no common law appellate juridiction in Oregon. *Ragnone v. Portland Sch.Dist. No. 15, 289 Or 339,341, 613 P2d 1052 (1980).* Oregon's appellate courts have appellate jurisdiction over the appealable judgments, decrees and orders of the circuit courts, ORS 19.010, but that jurisdiction is revisory, and nothing more. *Or. Const. Art.VII (Orig), Sec.6. See Ragnone,supra at 341 n.1.*

The Court of Appeals has statutory power to make and enforce 'all rules *** for *** the remanding of causes to the lower courts.' ORS 2.560(6).

In this case the Court of Appeals took jurisdiction over the initial, administrative judgment of the trial court, *see A-13,infra,* it made its initial decision in the case and remanded for additional proceedings.

As argued *supra*, the circuit court had initial jurisdiction over both administrative and non-administrative issues. When it entered its initial judgment concluding judicial review of administrative issues pursuant to the Oregon Administrative Procedures Act, ORS ch 183, the non-administrative issues were not concluded on the face of that judgment, *see at* A-13, *infra*, and remained pending for trial and for decision.

The Administrative Procedures Act is "a self-contained statute with its own separate provisions for appeals", ORS 183.500, limited to appeals entered from the decree entered by the circuit court on judicial review under that statute. *Cf. Peter Kiewit v. Port of Portland*, 291 Or 49,63, __P2d__ (1981). Appeal from the circuit court's judgment on judicial review did not therefore confer on the Court of Appeals jurisdiction over the non-administrative issues

as to which no final judgment had been entered. On initial appeal the Court of Appeals had no power of decision as to non- administrative issues not before it; all such issues remained pending in the circuit court.

On initial appeal, recognising that the question of damages was not within the scope of proceedings authorised by the Administrative Procedures Act, the Court of Appeals remanded the case to the circuit court's equity side. *See at* A-59, *infra*. When the case was revived, the circuit court had before it not only the specific issues on which remand had been ordered, but also the non-administrative issues pending from the earliest stages of the case.

On initial appeal the Court of Appeals could properly try the administrative cause anew upon the record. ORS 183.500, 19.125(3). It could properly determine that the appellant had a property interest

sufficient for him to have the right to a contested case under the Administrative Procedures Act, and it was within the scope of its jurisdiction on that appeal to determine that the appellant's right to due process and his right to a contested case had been violated.

The Legislature did not include in the Administrative Procedures Act of 1969 any provision authorising the reviewing court to decide the scope of the injury resulting from the violation of the right to a contested case, or, in this case, of the related due process right. On initial appeal the Court of Appeals had no power deriving from the Administrative Procedures Act to decide the scope of the appellant's injury.

Thus, when the case was revived in the circuit court below, the appellant could reasonably expect a trial on the non-administrative issues presented by the pleadings

in addition to the issues which the Court of Appeals could not have decided and for which remand had been ordered. The appellant Papadopoulos had a legitimate claim of entitlement under state law to seek to amend and, if appropriate, to supplement the pleadings, in the furtherance of justice. His entitlement under the statutes, ORS 16.360,16.390 (repealed effective 1980), Or.Rules Civ. Proc. 23., was to the exercise of judicial discretion.

The request for leave to amend the pleadings was denied, *see at A-62,infra,* not in the exercise of judicial discretion, but in obedience to the mandate of the Court of Appeals. The circuit court also restricted the scope of the revived proceeding in obedience to that same mandate. The Court of Appeals agrees with the circuit court's interpretation of that mandate.*See at A-4,infra.*

The Court of Appeals, on initial

appeal, lacked power to decide any non-admininistrative issue outside what was ancillary to the consideration of the appellant's right to proceed under the Administrative Procedures Act. Being undecided, such non-administrative issues remained open until the trial court entered a final decisions under its general powers as a court of law and equity. Since they were concluded, although undecided, because of the mandate of the Court of Appeals, the source of the power to conclude those issues must lie in the statutorily-granted power of the Court of Appeals to make and to enforce rules for the remanding of causes. ORS 2.560(6).

The Court of Appeals, then, impliedly fashioned a rule governing and restricting the procedures available on remand in this case. The remand could not have involved a <u>decision</u> of the appellant's non-administrative claims; those issues lay outside the jurisdiction of the Court of Appeals which in any case has no 'original'

jurisdiction. The remand therefore involved application of a rule whose effect was to bar the trial court on remand from considering the majority of non-administrative issues arising on the pleadings as well as those which could have been presented by supplementary pleadings.

In this context the remand was 'legislation' looking to the conduct of prospective proceedings in the case and changing the existing conditions of litigation, *cf. Prentis v. Atlantic Coast Line Co., 211 US 210,226 (1908).* And because the remand barred the trial court from hearing the appellant's contract claims even for the purpose of restoring the appellant to that which he had lost as the 'victim of an unconstitutional act.' *See at* A-59, *infra.* The remand barring the trial court

the trial court from hearing his contract claim thereby barred the appellant from the only judicial forum available to him, and hence was legislation impairing the obligation of contract entered into by a public body having statutory authority to enter into contracts under ORS 352.240 and to be sued thereon as an implied provision thereof.

Such legislation violates the U.S. Constitution's Contract Clause. That clause limits the State's power to modify the terms of its own contracts. *U.S. Trust Co., v. New Jersey, 431 US 1 (1977)* The idea that a court can legislate is not new to this Court. *Cf. Lathrop v. Donohue, 367 US 820,825 (1961).*

This question has not been raised below. It could not have been raised in the Court of Appeals since the limitations on the remand could only appear after the issuance of its decision on second appeal. It was not placed before Oregon's Supreme Court

because that Court lacks power under the statutes to review anything but the decisions of the Oregon Court of Appeals, ORS 2.520. Taken alone, a rule for the remanding of causes to the lower courts is not a 'decision' which the Oregon Supreme Court can review.

This Court should give plenary consideration to the unresolved question of whether an implied rule of court can be classified as a law for the purpose of the Contract Clause, and to the related question of whether the same rule can constitute a 'statute' for the purpose of conferring on this Court jurisdiction pursuant to 28 USC Section 1257(2). This is the appellant's first opportunity for raising this particular federal issue; that the Court of Appeals would affirm the trial court's view of the restrictive remand could not have been anticipated on the basis of any prior decision of the Oregon Supreme Court.

This Court should give plenary consideration to this issue because it governs the exercise by this Court of its appellate jurisdiction in this case. *Cf. Brinkerhof-Faris Trust v. Hill, 281 US 672,678 (1930).*

5. The appellant has been denied access to remedy in the trial court below in violation of his rights under the First and the Fourteenth Amendments to the U.S. Constitution.

The appellant Papadopoulos claims that he has been barred from access to the judicial procedures otherwise available in the trial court below as to certain issues which have never been tried or decided therein, that he has a legitimate claim of entitlement to such access, and that there is no alternative judicial machinery available for resolving his dispute with the appellee Board.

His claim of entitlement rests partly

on Oregon's constitutional promise that

> " * * *justice shall be administered completely * * *, and every man shall have remedy by due course of law for injury done him in his person, property or reputation." *Or. Const. Art.I section 10.*

and in part on this Court's view that

> " * * * justiciable (federal) constitutional rights are to be enforced throught the courts. * * *(The) class of litigants who allege that their own constitutional rights have been violated * * * must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable rights. * * *" *Davis v. Passman, 442 US 228, 242 (1979).*

The trial court record shows that the appellant invoked the trial court's jurisdiction as a court of equity and that the appellee Board subjected itself to that same jurisdiction by filing responsive pleadings where no such pleading was required by the Administrative Procedures Act. ORS 183.480(2) (1969).

Of the matters placed in issue by the

pleadings some (e.g. the issue of the timeliness of notice of termination) were non-administrative issues, ancillary to the administrative issues raised because their resolution was necessary to the determination of the appellant's right to proceed under the Oregon Administrative Procedures Act. *See A-51 through A-58, infra.* Other issues arising on the pleadings, especially the appellant's claim of violation of his rights under the First Amendment, could have nothing to do with administrative matters; the claimed violation of First Amendment rights has never been held to trigger the 14th Amendment's prior hearing right, hence could not, in this case, trigger the right to a contested case under the Administrative Procedures Act.

The record of the trial court shows,also, that the court agreed with the appellant's claim that his discharge was in violation of the Due Process clause, based solely on the pleadings, and that trial was had before

the circuit court only as to the issue of the appellee Board's defense of exemption from the contested case provisions of the Administrative Procedures Act. Ultimately the circuit court upheld the appellant's claim of entitlement to a contested case and it remanded proceedings to the appellee Board. *See at A-10, infra.*

The appellee Board held a hearing. Its original pre-discharge hearing had been limited to three issues, *see at A-8, infra,* and had not been preceded by notice of the reasons for the appellant's prospective discharge. On remand, the administrative record shows that the appellee Board issued no new notice of issues it would determine, also that the Board issued findings on issues that were before the circuit court for its determination. *See at A-12, infra.* Thus the Board made findings of fact holding that its subordinates had not acted in violation of the appellant's rights

under the First and Fourteenth Amendments to the US Constitution.

The remanded hearing was not the pre-discharge hearing mandated by the Due Process clause. The appellant had no such pre-discharge hearing. *See at A-58, infra.* His post-discharge hearing was not a contested case because it was not an proceeding in which

> " * * * the individual legal rights, duties or privileges of specific parties are required by statute or constitution to be determined only after an agency hearing * * *." *ORS 183.310(2) (1969)*

Because there was no contested case, *see A-58, infra,* there was under the 1969 Administrative Procedures Act no administrative decision which the circuit court could review.

The circuit court nevertheless reviewed the administrative record, and on the basis of that record it affirmed the appellee Board's order, *see at A-13, infra,* without hearing testimony and

without being briefed.

The appellant's claim to have been denied access to the judicial machinery below in this complex procedural situation is summarized as follows:

(a) The appellee Board's post-discharge decision, *see at A-11, infra*, has no judicial value. No statute authorizes the Board to act as a court of general jurisdiction, and no statute gives Oregon's courts the power to delegate judicial powers of decision to the Board. The Board is 'a creature of statute whose authority extends as far as the statute's extent and no further.' It is not the province of Oregon's courts to convert the Board into a court. *See Bd. of Commrs. v. Dept. of Land Con. & Dev., 35 Or App 725, 582 P2d 59,63 (1978)* There was no contested case in which the Board could exercise judicial powers of decision, and there exists no authority by which the Board

could adjudicate federal constitutional issues.

(b) The circuit court by its initial judgment, on its face restricted to administrative issues, could not decide the appellant's First Amendment claims on the basis of an administrative record (i) not prepared for the purpose of trying an issue which the Board could try; (ii) not prepared on the basis of notice that the Board would try that issue; and (iii) prepared on the basis of ORS 183.450 which required the Board under order, *see A-10*, to decide only as supported by and in accordance with 'reliable,probative and substantial evidence'.

The appellant Papadopoulos holds a legitimate claim of right under Oregon law to have his First Amendment claims decided by a court of competent jurisdiction and based on the preponderance of evidence. ORS 17.250(5). Cf. The First Amendment does not authorise the decision of such claims

on the lower standard of proof required for administrative decisions to act within their authorised scope.

(c) On initial appeal, the Court of Appeals affirmed, in part, the judgment appealed from. *See at A-60, infra.* The Court of Appeals nowhere affirmed the appellee Board's administrative decision which was affirmed by the trial court, and it could not do so because it had no power to review an administrative decision which was not a contested case. Nor could it affirm any part of the trial court's judgment affirming an administrative decision which was not a contested case. It could, however, affirm the trial court's judgment in so far as that judgment was cross-appealed by the Board.

(d) On remand the appellant attempted to invoke civil procedures under the statutes. He sought to amend the pleadings, and he

a state-created claim of entitlement to the exercise of judicial discretion in respect to such amendment. As already stated, amendment was denied, but not in the exercise of judicial discretion.

(e) On second appeal the appellant sought reconsideration of the initial Court of Appeals' mandate, for the reason that as interpreted by the trial court that mandate would result in the denial of the appellant's Due Process rights under the 14th Amendment, and would also deny him remedy to which Oregon's Constitution entitled him.

Therefore, it is the appellant's claim that by its judgment below, the Oregon Court of Appeals has foreclosed him from access to the trial court for the enforcement of his rights under the First Amendment, rights implied by the First Amendment itself, and has also barred him from access to the state-

created judicial machinery already invoked in this case, and has violated the appellant's rights under the Fourteenth Amendment thereby.

Because this case shows that the appellee Board has indeed violated the rights of appellant Papadopoulos under the federal Constitution's Due Process clause, and because the record shows that his right to judicial evaluation of his First Amendment claims has not been granted, this Court should give plenary consideration to the case. To the extent that the denial of the appellant's right of access to the circuit court's judicial machinery appears on the face of the judgment and this jurisdictional statement, the case need not be set on this Court's calendar for oral argument. This Court should reverse the judgment below with instructions.

CONCLUSION

The Court of Appeals has misread its prior opinion in the case, it has ignored as mistaken the prior federal judgment in a companion case, it has misread this Court's decisions on the subject of the Due Process clause and it has refused to reconsider or clarify its previous decision in the light of the law now applicable. For the reasons stated this Court should reverse the judgment below with instructions for the circuit court to give opportunity for trial of all non-administrative matters remaining at issue on the pleadings, and with opportunity for amendment of the pleadings in accordance with established procedure and with state law.

Respectfully submitted,

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OPINION BELOW

IN THE COURT OF APPEALS
of the
STATE OF OREGON

MICHAEL PAPADOPOULOS *Appellant,*	)	No.CA 15227
v.	)	Trial Court No. 70049
OREGON STATE BOARD OF HIGHER EDUCATION, *Respondent.*	)	

On appeal from Circuit Court, Marion County. Opinion entered October 13,1973 and reported at *48 Or App 739, 617 P2d 931.*

Val D. Sloper, Judge.

Argued and submitted July 16, 1980.

Dennis Sarriugarte, Salem, argued the cause for appellant. With him on the briefs was Michael Papadopoulos Ph.D., Salem.

Jan P. Londahl, Assistant Attorney General, Salem, argued the cause for respondent. With him on the brief were James M. Brown, Attorney General, and Walter L. Barrie, Solicitor General, Salem.

Before Joseph, Presiding Judge, and Warden and Warren, Judges.

JOSEPH, P.J.

Affirmed as modified and remanded for entry of an amended judgment consistent with this opinion.

JOSEPH, P.J.

On remand after our previous decision in this case (*Papadopoulos v. Bd. of Higher Ed.*, 14 Or App 130, 511 P2d 854, *rev den* (1973), *cert den* 417 US 919, 94 S Ct 2626, 41 L Ed 2d 224 (1974)), the trial court entered a judgment in plaintiff's favor for $18,333 and denied costs. Plaintiff subsequently filed a motion to reopen the case and a motion to reconsider, both of which were denied. Plaintiff has appealed from the judgment and from the order denying his motions.

Defendant properly points out that plaintiff has not made assignments of error and has not complied with other aspects of Rule 7.19, Rules of Appellate Procedure. We would be justified in refusing to consider the case further for that reason. Generally, hereafter we will refuse to consider assignments not properly made; however, in the probably and tragically vain hope of encouraging an end to more than a decade of litigation, we have given full consideration to the plaintiff's urgings and arguments. We find that only one of them has merit, and we will remand the case for entry of an amended judgment.

The factual background of this case is well set out in our prior opinion: 14 Or App at 135-153; and it need not be repeated. In that opinion Chief Judge Schwab wrote:

> "Instead, it appears that petitioner is entitled to money damages in the form of what his salary would have been for the 1970-71 academic year less the amounts he did earn or reasonably could have earned during that period. *** However, as noted, we have not had the benefit of full argument on the remedy issue, and there is no evidence in the record on petitioner's mitigation, i.e. what he did earn or reasonably could have earned during the 1970-71 academic year. Therefore, upon remand the circuit court will explore and, if necessary, hear evidence on the remedy issue. ***
>
> "* * * * *
>
> "In summary, we hold: (1) The notice of termination of employment petitioner received was too tardy,

under the Board's regulations, to terminate petitioner's employment effective June 1970; (2) therefore, under the same regulations petitioner had an expectation of continued employment until June 1971; (3) petitioner's expectation of continued employment was a property interest within the meaning of the Due Process Clause — he could not be deprived of continued employment until June 1971 with a pretermination hearing; (4) such a hearing had to comply with the requirements of the Administrative Procedures Act, ORS chapter 183; (5) petitioner was not accorded a pretermination hearing that complied with the Administrative Procedures Act. Thus, to the extent that the circuit court affirmed the petitioner's discharge effective June 1970, that determination is reversed and remanded for further proceedings on petitioner's damages for the 1970-71 year. In all respects the circuit court's decision is affirmed." 14 Or App at 178-179.

The order on remand was not entered as a judgment in the circuit court until May, 1975; even then the matter did not quickly come on for further proceedings. In 1975 plaintiff filed an action in the federal district court for Oregon arising out of the same facts. A summary judgment for the defendants in that action was entered and upheld on appeal by the Ninth Circuit Court of Appeals.[1] Plaintiff also filed a similar action in the Multnomah County Circuit Court, which gave *res judicata* effect to the federal court decision and dismissed the state action. That determination was not appealed.

In this case in 1977, plaintiff filed for leave to amend his second amended petition insofar as necessary to convert what was originally a petition for review of an administrative agency decision into a complaint for legal and equitable relief. The motion was denied when the matter finally came on for hearing on the remand in June, 1979.

The trial court determined that plaintiff's 1970-71 academic year salary would have been

[1] Or so we were told in the briefs and on argument. The federal Court of Appeals' decision was apparently unreported.

$15,000 plus two months additional salary for summer work in 1970 and that there was no "mitigation." The court instructed plaintiff's counsel to submit a memorandum on the allowance of interest, but none was ever filed. The court entered judgment in a form submitted by defendant and denied the post-trial motions.

Plaintiff asks that we do several things. First, he would have us "reconsider" our original decision because, he says, "This court's decision has precluded him from his civil remedies in all other courts" and because it improperly decided or "ignored" issues involved. With regard to the preclusion claim, we restrict our response to saying that the wrong carpenter is being blamed for the construction of the bed plaintiff finds himself in. That the remedies available under the administrative review procedure initiated by plaintiff and his original counsel was more limited than other procedures might have been and that other courts in other cases might have erred in determining plaintiff's claims are not chargeable to the merits of our decision. With respect to the "ignored issues" claim, we are satisfied that they were either dealt with correctly or were not before the court in an administrative review proceeding. We decline to reconsider our original decision.

Second, he asserts that the circuit court erred in interpreting the scope of our remand. He is wrong. The circuit court exercised its authority in precise conformity to the remand.

Third, plaintiff argues that the trial court "abused judicial authority and judicial discretion by denying the motion to reopen the case on the grounds of newly-discovered evidence and without even allowing plaintiff *** oral argument ***." On this point we agree with defendant's brief:

> "There are so many conceptual and legal muddles in plaintiff's articulate and quite energetic brief that clearing up the difficulties would be tortuous and pointless. But it is at least plain that plaintiff's brief bears little or no relation to the Motion to Reopen

Case which it purports to argue should not have been denied. Plaintiff has not pleaded breach of contract and cannot now offer testimony relevant to such a claim; he has not pleaded an action for defamation and testimony regarding such a claim would not be relevant; and he was granted relief for the constitutional violation and the administrative rule violation on which the constitutional claim was premised. ***"

The motion was denied without oral argument, although the relevant local rule provided for oral argument in mandatory terms. Nonetheless, it is plain on the face of the motion and from plaintiff's own affidavit attached to the motion that the matters sought to be raised were either not material to the only matter properly before the court on remand or had already been the subject of the remand hearing and would have added nothing of import to the record. Furthermore, the motion and affidavit (with a number of exhibits) speak well for themselves. We are not at all persuaded that denial of oral argument, if it was done in violation of the local rule, is a matter compelling a remand for argument.

Fourth, and last, plaintiff asserts that to allow him merely the amount of salary he would have been paid in 1970-71 without interest was improper.[2] We

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[2]The evidence at the remand hearing is well summarized in defendant's brief:

"At the hearing held June 7, 1979 to determine the amount of plaintiff's damages, there was evidence that plaintiff's previous employment with Oregon State had been compensated at a rate of $15,000 per academic year *** and that he normally was granted a summer employment as a researcher at a commensurate rate. *** Plaintiff testified as to the fringe benefits associated with employment as a professor of mathematics *** although there was no testimony indicating a monetary value for those benefits. No evidence was introduced relevant to the issue of adjustments for inflation and no evidence on the issue of interest was introduced, although plaintiff's counsel did state 'Let me ask about interest, Your Honor. If he had had the money, at least it could have drawn interest.' *** Some mention of inflationary adjustment may have been made in closing argument, because the court stated, at the conclusion of the argument, 'I don't think I can make any adjustment for inflation. The novel approach to it and in the absence of some concrete authority that ought to be done, I would decline to do that.' *** No request for costs and attorney fees was made prior to the Motion to Reconsider. At the conclusion of the hearing, the

(Continued on following page)

agree that interest ought to have been allowed, even though plaintiff's counsel failed to respond to the court's request for authority on the point and failed to submit a judgment, as he was directed to do. A month after the hearing the court signed a judgment submitted by defendant.

One of the thrusts of our original opinion was that the trial court was to determine what *monthly* salary plaintiff would have received during 1970-71. The only evidence at the hearing on remand was that that amount was $1,666.67, payable on the last day of 11 consecutive months, the first of which was July, 1970. ORS 82.010(1)(a) provided in the relevant years:

> "(1) The legal rate of interest is six percent per annum and is payable on:
>
> "(a) All moneys after they become due; ***."

Under our decision those monthly payments had become "due" serially, beginning July 30, 1970, and plaintiff was entitled to simple interest thereon.

Using the statutory interest rate, we calculate the total interest that should have been allowed as of July 6, 1979, was $9,371.80.[3] In a sense this gives the plaintiff the benefit of delay for which he was himself responsible, but it does not appear that the defendant has at any time since our original opinion tendered plaintiff any payment whatsoever, not even the $15,000 which it asserted at the hearing was the minimum salary plaintiff would have received.

(Continued from previous page)

Court granted plaintiff $15,000 and an additional sum for summer employment. The Court also stated that, 'I rather assume he'd be entitled to [interest].' *** and asked plaintiff's counsel to prepare a 'form of judgment.' *** Some difficulty not reflected in the record must have occurred, because the final order, filed a month later, appears on Department of Justice forms and does not include interest."

[3] We concede that plaintiff is considerably more qualified than we to make the requisite calculation. On remand he will be entitled to challenge our calculation by affidavit using the same assumptions: $1,666.67 payable on the last day of July, 1970, and an equal amount on the last day of each of the succeeding 10 months at six percent simple interest to and including July 6, 1979.

The amended judgment will, of course, bear interest at the statutory rate applicable when the remand judgment was entered in 1979. Plaintiff ought also to be allowed costs and disbursements as the prevailing party.

Affirmed as modified and remanded for entry of an amended judgment consistent with this opinion.[4]

[4] We are at pains to express something that ought to go without saying: Our remand is limited strictly to the modification of the judgment; only our arithmetic and the amount of costs and disbursements to be allowed are in issue.

48 Or App 746

INITIAL AGENCY DECISION

STATE OF OREGON
BOARD OF HIGHER EDUCATION
(April 7, 1970)

Dear Professor Papadopoulos:

This is to confirm the brief telephone conversation Chancellor Lieuallen had with you on the afternoon of April 7 in which he informed you of the decision of the State Board of Higher Education on the issues raised concerning your relationship with Oregon State University.

The State Board of Higher Education met

on April 7 in executive session to consider the report of its committee on academic affairs with respect to the hearing you had with the committee at its meeting in Portland on March 26. As you will recall, the committee had, through the Chancellor established as the basis for its hearing of your case, that it would consider three questions:

1. Whether you had received appropriate notice of termination of employment as required by the Administrative Code;

2. Whether you had been considered for indefinite tenure in accordance with the Board's Administrative Code; and

3. Whether there was ever any commitment, binding upon the Department of Higher Education, to you concerning indefinite tenure.

Having heard the presentation of your testimony on these matters, and that of other witnesses who were present to testify, the committee concluded that you had been given proper notice of termination as required by the Administrative Code,

and that you had been considered for indefinite tenure in accordance with the Code. It felt that no commitment binding upon the Department of Higher Education had been made concerning indefinite tenure.

All of the Board members had been supplied with a file containing letters and other pertinent materials relating to your appeal at the same time the members of the academic affairs committee were, so that when the Board met in executive session on April 7 its members were well acquainted with the essential features of the issues under consideration. Following a report of the March 26 hearing with the academic affairs committee, there was further discussion of the issues by the entire Board. Upon conclusion of the discussion, the Board concluded that it concurred in the findings of its committee.

(signed) George Layman
President

JUDICIAL ORDER OF REMAND

STATE OF OREGON

MARION COUNTY CIRCUIT COURT
(February 11,1971)

MICHAEL PAPADOPOULOS, *Petitioner,*	)	No.70049
vs.	)	
OREGON STATE BOARD OF HIGHER EDUCATION, *Respondent.*	)	ORDER

Application having been made by petitioner for leave to present additional evidence, and it having been shown to the satisfaction of the Court that respondent agency is subject to the Oregon Administrative Procedures Act, that the additional evidence is material and that there were good and substantial reasons for failure to present it in the proceeding before the agency, it is hereby ordered that additional evidence be taken by the respondent agency under the conditions imposed in ORS 183.420, 183.440, 183.450 and 183.480(5).

Val D. Sloper
Judge

AGENCY DECISION ON REMAND

STATE OF OREGON

BOARD OF HIGHER EDUCATION
(September 7, 1971)

MICHAEL PAPADOPOULOS, *Petitioner*	)	FINDINGS OF FACT
	)	&
v.	)	CONCLUSION
OREGON STATE BOARD OF HIGHER EDUCATION, *Respondent.*	)	

This matter coming before the Oregon State Board of Higher Education at its regularly scheduled meeting in Carson Hall, University of Oregon, on September 7,1971, on the Findings of Fact and Conclusions of Law and Recommendations of Hearings Officer heretofore appointed, and the Board of Higher Education having examined and considered:

(a) the transcript and exhibits of the hearing held by the Hearings Officer on June 16, 17, 18 and 29, 1971;

(b) the Findings of Fact and Conclusions of Law and Recommendations of the Hearings Officer;

(c) the Exceptions to Findings, Conclusions of Law and Recommendations of Hearings Officer filed by Petioner;

(d) Oregon State University's Statement in Support of Hearings Officer's Findings of Fact,Conclusions of Law and Recommendation filed by Oregon State University;

(e) the Statement of Petitioner filed by Petitioner;

and now being fully advised in the matter

makes the following FINDINGS OF FACT:

1. That the procedure followed by the Oregon State University administration concerning the non-renewal of the appointment of Dr. Papadopoulos and concerning the denial of tenure to him complied with procedural due process in all respects;

2. That there was substantial evidence to justify the finding by the administration at Oregon State University that Dr. Papadopoulos did not comply with the standards of Oregon State University for production of scholarly research;

3. That the administration at Oregon State University did not base its decision to deny Dr. Papadopoulos indefinite tenure and a renewal of his academic appointment on any conduct protected by the constitution and laws of the United States of America and the State of Oregon;

and,therefore, it is the Board's CONCLUSION

That the decisions of Oregon State University not to grant indefinite tenure to Dr. Papadopoulos and not

to renew his academic appointment are affirmed.

George Layman
President

CERTIFICATE

I,Richard L.Collins,Secretary of the Oregon State Board of Higher Education,certify that the same legal majority of the Board of Higher Education adopted the above Findings of Fact and Conclusion as stated on the date stated,though the President, Mr.Layman, dissented from the Findings of Fact (2) and (3) and from the Conclusion.

Dated September 14,1971

Richard L.Collins
Secretary

JUDGMENT ON ADMINISTRATIVE REVIEW

STATE OF OREGON

MARION COUNTY CIRCUIT COURT
(February 15,1972)

MICHAEL PAPADOPOULOS, *Petitioner*	)	No. 70049
v.	)	
OREGON STATE BOARD OF HIGHER EDUCATION *Respondent.*	)	JUDGMENT

This matter being before the Court on

the Second Amended Petition of the Plaintiff and the Court having examined the record including the record of proceedings before the Board of Higher Education, and being advised in the premises, makes the following FINDINGS:

1. There was no denial of Due Process concerning the non-renewal of the appointment of the plaintiff and the denial of tenure to him; and

2. The action of Oregon State University in refusing to renew the Plaintiff's contract and denying him tenure was based on his academic record and not based on constitutionally permissible conduct.

It is therefore the judgment of this Court that the Administrative Order of the defendant affirming the action of Oregon State University in refusing to renew Plaintiff's contract and refusing to grant Plaintiff tenure is affirmed.

Val D. Sloper
Circuit Judge

OPINION ON INITIAL APPEAL

STATE OF OREGON

COURT OF APPEALS
(No.CA 1747)
June 27, 1973

MICHAEL PAPADOPOULOS, *Appellant-Cross-Respondent,*

v.

OREGON STATE BOARD OF HIGHER EDUCATION, *Respondent-Cross-Appellant.*

Reported at *14 Or App 130, 511 P2d 854.*

VAL D. SLOPER, Judge.

Michael Papadopoulos, Corvallis, pro se, for appellant-cross-respondent.

Lee Johnson, Attorney General, John W. Osburn, Solicitor General, and Al J. Laue, Assistant Attorney General, Salem, for respondent-cross-appellant.

Herbert W. Titus, Cooperating Attorney, Eugene, American Civil Liberties Union of Oregon, Inc., amicus curiae.

Hans A. Linde, Eugene, Interinstitutional Faculty Senate, Oregon State System of Higher Education, amicus curiae.

Donald W. Brodie, Cooperating Attorney, Eugene, and Stephen R. Goldstein, Philadelphia, Pennsylvania, for American Association of University Professors, amicus curiae.

Before SCHWAB, Chief Judge, and FOLEY and FORT, Judges.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

SCHWAB, C.J.

Petitioner was employed as a Professor of Mathematics at Oregon State University from September 1967 to June 1970. In 1969 the respondent State Board of Higher Education or its subordinate officials at Oregon State decided to deny petitioner tenure and

to terminate his employment. By way of this judicial review proceeding pursuant to the Administrative Procedures Act, ORS ch 183, petitioner challenges those decisions. The circuit court upheld the Board and both petitioner and the Board appeal.

Literally dozens of issues have been briefed at length by petitioner and three amici supporting his position. The issues all relate to the substantive and procedural statutory and constitutional rights of public employes. For example, petitioner contends he was discharged because he engaged in First Amendment-protected activity or, alternatively, that his discharge was arbitrary; that he was entitled to a pretermination hearing on the reasons for his discharge; that the hearing he was accorded by the Board by order of the circuit court did not comply with the Administrative Procedures Act; and that the Board's discharge decision is not supported by substantial evidence. The Board, by its cross-appeal, contends the circuit court erred in ordering that petitioner be accorded a hearing on the reasons for his discharge. In our view the dispositive issue is whether petitioner was entitled to a hearing before being discharged effective June 1970.①

I

This record reveals, at the least, confusion on the part of the State Board of Higher Education and its subordinate officials at Oregon State University. To document this observation, we set out the facts in detail.

One source of confusion is the Board's regula-

① Schlichting v. Bergstrom, 97 Adv Sh 717, 13 Or App 562, 511 P2d 846 (1973) involves related issues.

tions. *See*, Parts II and IV, infra. These regulations provide that academic personnel, like petitioner, are employed with "yearly tenure" or "indefinite tenure." For the three years petitioner taught at Oregon State, he had only yearly tenure.

Petitioner assumed his duties as a Professor of Mathematics in the Department of Mathematics of the School of Science at Oregon State in the late summer of 1967. When he was offered this position by the Chairman of the Mathematics Department, before accepting it, petitioner inquired about the Oregon State tenure system. This was of some significance to petitioner, since another university had offered him a professorship with immediate tenure. The Chairman advised petitioner that under the Board's regulations it was not possible to be granted what those regulations term indefinite tenure when first hired. However, at the administrative hearing in this case several professors testified that they had been granted indefinite tenure at Oregon State when first hired.

In any event, correctly or incorrectly petitioner was informed it was not possible that he be granted indefinite tenure immediately. The Chairman did at least imply, and petitioner was led to believe, that the granting of indefinite tenure would be little more than a formality in his case.

Relying in part on these representations, and in part on the intent of the Mathematics Department to expand its programs in applied mathematics—petitioner's area of specialization—petitioner turned down other job prospects and accepted the offer from Oregon State. In fact, during the conversations that culminated in his employment at Oregon State, it was agreed that petitioner would devote a substantial

amount of time to building the Department's applied mathematics curriculum. All indications are that petitioner diligently and effectively did so.

In December of 1968, after petitioner had been at Oregon State about 1½ years, the Mathematics Department began processing a recommendation that petitioner be granted indefinite tenure. A four-member departmental committee unanimously recommended indefinite tenure for petitioner. The tenured faculty of the Department voted 20-1 in favor of indefinite tenure for petitioner. The Chairman of the Department added his own personal favorable recommendation.

The material generated in the Mathematics Department passed up the chain of command to John Ward, Dean of the School of Science. There had been previous instances in which Dean Ward displayed some displeasure toward petitioner. Between 1967-68, petitioner's first year at Oregon State, and 1968-69 most faculty members in the Mathematics Department received at least cost-of-living salary raises; through Dean Ward's efforts, petitioner did not receive any salary increase. Also, witnesses at the administrative hearing attributed to Dean Ward some highly defamatory statements about petitioner.①

Dean Ward consulted with his informal six-member Advisory Committee on all recommendations for indefinite tenure. When petitioner's case was discussed, some question was raised about petitioner's progress on a monograph he was writing. Dean Ward then asked the Chairman of the Mathematics

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① Dean Ward, who has left Oregon, did not testify at the administrative hearing. Nor did he respond to interrogatories sent him by both petitioner and the Board.

Department for an answer to this question. The Chairman responded by letter:

> "• • • Professor Papadopoulos is working on a research monograph on the topic of the theory of distributions as it pertains to the study of hyperbolic partial differential equations with particular applications to diffraction problems. I know enough of this topic to recognize that this would fill a significant gap in research literature. I have heard Professor Papadopoulos deliver a one-hour colloquium on some aspects of these questions; my impression from his sketch was that he had some very interesting contributions completed and also there remained much work to be done before he could achieve the degree of completeness demanded by a monograph. He estimates that he has about 1/3 of a completed first draft and, of course, notes and sketches of later parts."

Dean Ward did not tell his Advisory Committee of this letter; instead, purporting to be passing on an oral report, Dean Ward told the Committee there was no evidence that petitioner was making significant progress on his monograph. Also, Dean Ward told the Committee he had informally asked unidentified deans at other unspecified universities whether they would hire petitioner, and their answers were all in the negative. Not surprisingly, based on the information Dean Ward had furnished them, the Advisory Committee unanimously voted against recommending indefinite tenure for petitioner. The Committee was not asked to express any view on retention or non-retention of petitioner on an annual basis, and did not do so.

On February 25, 1969, Dean Ward then sent a letter to petitioner that stated:

> "As you have been aware, the Department of Mathematics, and especially the faculty of the De-

partment, have undergone intensive evaluation and review by an outside evaluation committee and internal committees. After many hours of discussion and evaluation of the recommendations of all groups concerned, I have had to make several decisions concerning recommendations for indefinite tenure for non-tenured faculty members as well as informing faculty members not necessarily considered for tenure that they will not be reappointed to their positions * * *.

"* * * In your particular situation, you will not be recommended by this office to the Dean of Faculty for reappointment to the faculty of the Department of Mathematics after the academic year 1969-70."

In so far as it discloses a reason for his decision, Dean Ward's letter implies that petitioner's contributions to the Department of Mathematics were believed to be inadequate by various evaluation committees. The only evaluation reports to which Dean Ward could have been referring are in the record before us. There is nothing in those reports that is any way critical of petitioner.

After receiving Dean Ward's letter, petitioner protested to the Faculty Senate Committee on Review and Appeals that he was being dealt with unfairly. That Committee considered petitioner's case along with two others. The Committee reported:

"* * * *

"In the opinion of the members of the Review and Appeals Committee, faulty judgment was evident on the part of the previous chairman of the Department of Mathematics when he implied, during appointment negotiations with the appellants, that the granting of indefinite tenure was a routine matter and would occur in the natural course of events even though based upon 'mutual satisfaction.' * * * [S]tatements made to prospective ap-

pointees probably should have spelled out more carefully the process by which indefinite tenure was granted and the ultimate responsibility for such decisions.

"Nevertheless, inquiries made by the Committee of the appellants and others disclosed that, while tenure matters were discussed (either orally or in writing), representations of the routine nature of indefinite tenure recommendations were such as to lead the appellants to believe that indefinite tenure would be granted as a matter of course. * * * Such implied commitment on the part of the department chairman apparently was not unique but, rather, appeared to be the prevailing practice at the time of the appointment of, or negotiation with, the three appellants.

"By the same token, questionable procedures were followed by the Dean of Science in reversing the recommendations of the Department of Mathematics, especially in the instances of Drs. * * * and Papadopoulos whose recommendations carried nearly unanimous approval, solely on professional grounds, by the tenured members of the Department.

"The 1966 Statement on Government of Colleges and Universities jointly formulated by the American Association of University Professors, the American Council on Education, and the Association of Governing Boards of Universities and Colleges, states in part V. The academic institution: the faculty—

> " 'Faculty status and related matters are primarily a faculty responsibility; this area includes appointments, reappointments, not to reappoint, promotions, the granting of tenure, and dismissal. The primary responsibility of the faculty for such matters is based upon the fact that its judgment is central to general educational policy. Furthermore, scholars in a par-

ticular field or activity have the chief competence for judging the work of their colleagues; in such competence it is implicit that responsibility exists for both adverse and favorable judgments. Likewise there is the more general competence of experienced faculty personnel committees having a broader charge. Determinations in these matters should first be by faculty action through established procedures, reviewed by the chief academic officers with the concurrence of the board. The governing board and the president should, on questions of faculty status as in other matters where the faculty has primary responsibility, concur with the faculty judgment except in rare instances and for compelling reasons which should be stated in detail.'

"In light of the foregoing statement and assuming that the dean of a school falls within the class of a chief academic officer, statements received from members of the Mathematics Department indicate that reasons for failure by the Dean of Science to concur with the departmental recommendation were not clear other than that the department of mathematics at certain unidentified universities would not appoint these persons as full professors to their staffs.

"In addition to the failure of the Dean of Science to state in detail compelling reasons for failure to concur with the judgments of the departmental faculty, it is the opinion of the Committee that evaluations based upon whether or not a department at another university, (even if such were specified) would appoint an individual at a given rank is at best a questionable practice. Such practice becomes more suspect when one does not know the questions asked or the information presented in requesting such an evaluation. In addition, the question arises as to whether the same or similar standards necessarily apply for the determination

of eligibility for indefinite tenure as those which might be employed in evaluating an individual for initial appointment. Again, the validity of the procedure followed is at best controversial.

"It further appears (but not verified) that the procedure of requesting an evaluation by the chairman of department of another university in terms of qualification for appointment to that university's staff was followed only in the three cases in question and was not a routine step in the evaluative process carried out by the Dean of Science's office. While it may be agreed that the evaluation of the three cases in question might present special problems because of the academic rank involved, the unusualness of the procedure and the significance placed upon such conclusions drawn therefrom raises the question as to whether such represents a significant departure from accepted practice.

"While it can be taken as a responsibility of the dean of a school, within the context of the above statement of primary faculty responsibilities, to attempt to insure excellence of departmental faculties, it would also follow that in doing so due regard must be given to the judgments of departmental faculties. In view of the care and thoroughness which appear to have been exercised by the faculty of the Department of Mathematics in making their evaluations of staff members being recommended for tenure and that such recommendations represent the opinions of a substantial majority of the departmental tenured faculty, it would appear that failure by the Dean of Science to concur with such recommendations would necessarily have to be supported by compelling reasons stated in detail to the tenured departmental faculty. In the instances in question, such detailing of reasons for failure to concur was not apparent to those members of the Mathematics Department interviewed in the course of the Committee's investigations.

"The Review and Appeals Committee concludes and recommends to the President:

"That Indefinite Tenure be granted to Dr. Michael Papadopoulos on the basis of:

"1. The near unanimous and positive recommendation of the tenured members of the Mathematics Department, based solely on the professional competency of Dr. Papadopoulos and the failure on the part of the Dean of Science to state compelling reasons for lack of concurrence with the departmental recommendation.

"2. Prior commitment."

After receiving the above report and recommendations, the President of Oregon State, by letter dated September 24, 1969, advised petitioner he had reached a contrary decision. This letter stated in part:

"With some regret we must advise you that we do not support the recommendation of the Review and Appeals Committee that you be granted indefinite tenure as a Professor of Mathematics at Oregon State University. The principal reasons for our decision are summarized below:

"1. To the best of our knowledge and understanding, the action of the School of Science in not recommending the granting of tenure and in recommending your non-reappointment after the academic year 1969-70 does not involve prejudice or other violations of your academic freedom. A request to review the possibility of violations of academic freedom was implicit in our charge to the Committee. The Committee's report and supplementary letter support our belief that no violation of academic freedom occurred and that no personal prejudice or discrimination was involved on the part of any individual or group who participated in the decision.

"2. We believe that the action of the School of Science, by imposing additional standards and professional judgments in its review of your department's recommendation, was consistent with sound academic policy and involved significant and responsible faculty participation in the decision making process. In conducting its reviews, the School attempted to apply proper and uniform criteria to all recommendations in an effort to insure fairness and to develop and maintain high academic standards in all disciplines. Moreover, it is our belief that the Dean's final decision had the strong support of his faculty Advisory Committee • • •.[1]

"3. Based on our review of both the departmental and school recommendations and also on our own attempt to evaluate your professional record, the executive office finds no sound academic basis for reversing the recommendation of the School of Science. Dean Ward has reported the reason for his decision to us, namely, the judgment that your professional record failed to demonstrate the degree of scholarly performance expected of a full professor in the School of Science. We consider this reason to be a proper basis for the dean's decision."

The President's letter concluded:

"• • • [W]e regard Dean Ward's letter of February 25, 1969, to you as a letter of timely notice of non-reappointment in accordance with the provisions of Section L-3-F of the Administrative

[1] The President's letter did not comment on the criticism of the Review and Appeals Committee to the effect that Dean Ward presented to his Advisory Committee inappropriate information on which to formulate its recommendation.

Code of the Oregon State Department of Higher Education."

Most prior attention had focused on whether petitioner would be granted indefinite tenure. Under the relevant regulations, *see*, Part II, infra, it would have been possible for petitioner to have been denied indefinite tenure, yet to remain at Oregon State on annual appointments for up to six years, perhaps being reconsidered for indefinite tenure at some future date. The record does not contain any clear explanation of why, in petitioner's case, the decision to deny indefinite tenure was coupled with a decision to also terminate his employment.

The President's reference to "the degree of scholarly performance expected of a full professor" was the first public reference to petitioner's termination being based on not having published a "sufficient" number of research papers. While it is clear this was a factor in the deliberations of Dean Ward's Advisory Committee, for some reason it had not been mentioned at all in the report of the Faculty Senate Review and Appeals Committee as being a stated reason for petitioner's termination.

Upon learning of the President's decision expressed in his letter of September 24, the Faculty Senate voted to conduct another, more detailed, investigation. The Faculty Senate created an Ad Hoc Committee consisting of three professors from outside of Oregon.

After spending two days at Oregon State in January of 1970, the Ad Hoc Committee reported:

"• • • Both • • • and Papadopoulos were, in the opinion of the two mathemetician members of

this committee, well above the average in the department and comparable with the most competent members. Hence they cannot be considered bad appointments * * *.

"That these appointments should have been offered and accepted without tenure requires separate discussion, for this was apparently connected with earlier university practice. Although opinion was not unanimous on this point, it seems to have been common before 1966 for tenure to be regarded as a certainty if one were more or less pulling his own weight in a department. * * * [B]oth * * * and Papadopoulos were apparently assured verbally that tenure was nothing to worry about even though the letter of appointment contained a caveat * * *.

"In 1966 with the advent of a new Dean of Science, Dean Ward, there was a sudden change in the attitude toward tenure and its granting, and this leads us into another aspect of the difficulty.

"When Dean Ward assumed his office in the fall of 1966, he apparently decided that one of his most important duties was to improve and upgrade the research quality of the various departments in the School of Science, and to increase also the quantity of research. This is, of course, a laudable goal and the time was possibly appropriate for taking some definite steps in this direction * * *.

"An important step [taken by Dean Ward] was the initiation of Departmental Review Committees consisting of distinguished men from outside the university who were charged with examining the department in question and making recommendations for its future development. One of the first such committees was appointed for the Mathematics Department. The three members (none of whom, by the way, were on a list of suggested persons given to the Dean by the Chairman) are outstanding mathematicians, spanning among them a large part of mathematics, and are also men of good will.

Unfortunately, their report was treated as a confidential report to the Dean and only portions of it shown to the Department members or to this committee. Those portions shown to us as a special privilege did not strike us as being unsuitable for general distribution. The parts not shown us contained among other things a rating of the department members on a scale of approximately 1 to 5—excellent, very good, good, fair, poor * * *.

"The Dean's treatment of this document as confidential has had an unfortunate effect. Perhaps unintentionally, it has been used as a weapon. Since no one *knows* where he stands, it is easy to imply that he is far down on the list and doesn't really deserve consideration in some matter or other. Whether such abuse is exaggerated or frequent is not the point. The situation should never arise and all future Visiting Committees should make their evaluations in terms which can be available to all. We think this can be done without precluding quality judgments.

"Another step taken by Dean Ward to improve quality was to apply more severe criteria for promotion and tenure. The somewhat easy-going attitude toward tenure which prevailed before 1966 was suddenly reversed and each tenure appointment was carefully scrutinized both by the dean and by his Advisory Committee. One can hardly find fault with taking such appointments seriously, but the suddenness of the change of policy certainly is a factor in the present case * * *.

"Against this background we now consider in more detail the appointments of * * * and Papadopoulos. As has already been pointed out, they, together with four other such appointees, came to OSU knowing that they did not in fact have tenure but believing that this was an administrative detail which would be taken care of in the near future, barring some gross neglect of duty or other malfeasance * * *.

"[When petitioner was considered for tenure] [a]s is customary in such matters, the chairman solicited letters from authorities outside the university who were likely to be familiar with the work of * * * and Papadopoulos. The outside consultants were well chosen and with one exception wrote strong letters of support for promotion to tenure. The one exception was somewhat lukewarm, but was clearly not based upon knowledge of the man's published papers, but instead upon general impressions. The proposed promotions to tenure were supported unanimously in the case of one of the men and with only one dissenting vote for the other by the tenured members of the department.

"Why, then, were they refused by Dean Ward? Two reasons were offered: (a) lack of recent research activity ('lack of performance'), and (b) further consultation with mathemeticians outside the university * * *.

"Before making this decision Dean Ward visited the chairmen of three other mathematics departments. He refused to identify them except to say that they did not include M.I.T. or Berkeley, a statement we interpret metaphorically to mean that the universities visited were appropriate ones for comparison with OSU. The question put to the department chairmen was, 'Would you hire either of these men in your department?' It is the opinion of the Ad Hoc Committee that this question, if indeed it was asked, is inappropriate and that, furthermore, there is considerable impropriety in the whole procedure. First of all, because it is secret and purely verbal, there is no written record to which one can turn for verifiable details as to the opinions of these department chairmen. Secondly, a department chairman is not competent to judge the quality of mathematical research except in his own field. It would be by the merest chance that his opinion, if he were willing to give one, would be as valuable as those of the authorities already consulted. One

of the chairmen consulted is accidentally known to us; his field of specialization is different from that of either of the men under consideration * * *.

"The other criterion was lack of research activity * * *.

"* * * [Petitioner's] publication record from 1954 to 1963 is outstanding. Following that period, there seems to be a gap until 1968 when two invited papers were given at a Symposium at Indiana University. One of these is appearing in the printed proceedings. We have seen the page proof and it appears to be a substantial paper. A criticism heard during our conversations at OSU that this was not a paper in a refereed journal seems misdirected and, furthermore a misreading of Papadopoulos's character. Whatever his faults, there is no evidence to indicate that he would be willing to publish pot-boilers. However, this still leaves a puzzling gap of five years.① This was partly explained in conversations with Papadopoulos. At the beginning of this period he developed a new method of treating a certain class of problems and decided that, instead of publishing it in a series of papers showing its application to different fields, he would write a monograph developing the method first and then the applications in succeeding chapters. There is no question but that he is writing the monograph. Various experts in the field referred to it in their supporting letters. One had a 105-page first draft of a portion of it, we saw it, and some of the material has been expounded in lectures at various places. Perhaps the real question is why has it taken so long to finish it. There seem to be several

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① The Board, in arguing there is substantial evidence to support the decision to terminate petitioner's employment, relies heavily on this reference to a "puzzling gap of five years" in petitioner's record of publications. However, we note that at least three of these five years were before petitioner came to Oregon State, and that at the administrative hearing the Board stipulated that petitioner was well qualified when hired.

reasons, principally a sticky point in the development which has held him up, and, since coming to OSU, time spent in developing new courses. Although the period of not much visible activity may appear overlong for one who was so active in research earlier, it is not clear that he has either run out of steam or lost interest. If forced to judge whether his work will progress in a stable job environment or whether his drive to continue creative work has been largely lost for good, a difficult question of judgment, our committee would find itself split in its feelings, one saying the drive is inadequate for further productive work, and two saying it is adequate * * *."

The Ad Hoc Committee's report was submitted to the Faculty Senate. That body then adopted a resolution phrased in terms of the Ad Hoc Committee's ultimate conclusion:

"In our opinion the department [of Mathematics] will be in the best position for continued development of strength if the University accepts its moral commitment to award tenure in the cases of M. Papadopoulos and * * *.",

and requested the President of Oregon State to reconsider his prior decision to the contrary.

By letter dated February 19, 1970, the President advised petitioner:

"This office has given careful reconsideration to your tenure case in the light of the Faculty Senate's action of February 12, 1970, and of the ad hoc committee's report of February 3, 1970. We must advise you that our decision of September 24, 1969 has not been altered. This decision is based on our judgment, that the ad hoc committee's report concerning the adequacy of performance constitutes additional reasonable doubt that tenure should be granted."

The President's letter did not elaborate on why he believed a 2-to-1 vote that petitioner was likely to continue to produce good research and publications created "reasonable doubt that tenure should be granted."

Petitioner then appealed to the Board. In March of 1970 the Board's Academic Affairs Committee held a hearing on petitioner's appeal. The Committee limited its inquiry to questions of whether proper procedures had been followed at Oregon State in petitioner's case. In spite of the explicit statutory authority for the Board to make personnel decisions, ORS 351.070 (1)(a),[4] the consensus among the Board members present was that the substantive questions of whether petitioner should be granted tenure or terminated were beyond their competence. As the Committee's report of that meeting states:

> "• • • Mr. L yman expressed the view that as a matter of principle the board would be in a difficult position if it undertook to judge matters of substance relating to an individual's competence in an academic field and to substitute its judgment for that of the president—assuming their views differed.
>
> "Chancellor Lieuallen pointed out the hazards of asking the board to rule on matters of substance in which the president had acted. If the board were to sustain a faculty member's appeal and reverse the president's decision, what would keep the board tomorrow from making the decision to insist upon the employment or the granting of tenure to some-

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[4] "(1) The State Board of Higher Education may, for each institution under its control:

"(a) Appoint and employ a president and the requisite number of professors, teachers and employes, and prescribe their compensation and tenure of office or employment." ORS 351.070 (1)(a).

> one acceptable to the board but who might be unacceptable to the president or to faculty groups."

The Committee concluded that proper procedures were followed in petitioner's case. It so reported to the Board, which then adopted these conclusions.

Petitioner then initiated this judicial review proceeding in circuit court. The Board initially contended it was wholly exempt from the Administrative Procedures Act. The circuit court ruled to the contrary—a ruling the Board's cross-appeal does not assign as error. Petitioner then called the circuit court's attention to: (1) some omissions and possible errors in the transcript of the hearing before the Board's Academic Affairs Committee; and (2) the fact that the Committee had limited its inquiry to purely procedural matters. Petitioner contended these were grounds for remanding the case to the Board for the production of additional evidence. The circuit court agreed and entered the following order on February 11, 1971:

> "Application having been made by petitioner for leave to present additional evidence, and it having been shown to the satisfaction of the Court that respondent agency is subject to the Oregon Administrative Procedures Act, that the additional evidence is material and that there were good and substantial reasons for failure to present it in the proceeding before the agency, it is hereby ordered that additional evidence be taken by respondent agency under the conditions imposed in ORS 183.420, 183.440, 183.450 and 183.480 (5)."

By this order the circuit court, in effect, ruled that the Board had to accord petitioner a hearing on the grounds for the termination of his employment.

In compliance with the circuit court's order, petitioner was granted a four-day hearing. The hear-

ing officer prepared detailed proposed findings of fact and conclusions of law, all generally adverse to petitioner's position. After considering the administrative record, the Board adopted its own more limited findings

"1) That the procedure followed by the Oregon State University administration concerning the non-renewal of the appointment of Dr. Papadopoulos and concerning the denial of tenure to him complied with procedural due process in all respects.

"2) That there was substantial evidence to justify the finding by the administration at Oregon State University that Dr. Papadopoulos did not comply with the standards of Oregon State University School of Science for production of scholarly research.

"3) That the administration at Oregon State University did not base its decision to deny Dr. Papadopoulos indefinite tenure and a renewal of his academic appointment on any conduct protected by the constitution and laws of the United States of America and the State of Oregon.",

and conclusion

"That the decisions of Oregon State University not to grant indefinite tenure to Dr. Papadopoulos and not to renew his academic appointment are affirmed."

II

Whether petitioner was entitled to a pretermination hearing on the reasons for his discharge depends upon a combination of Oregon statutes and United States Supreme Court cases interpreting the Due Process Clause of the Fourteenth Amendment to the United States Constitution. We first consider

some of the relevant statutes. In Part III, infra, we consider the constitutional authorities.

1. One relevant statute is the Administrative Procedures Act, ORS ch 183. However, there is a question as to which of two different versions of the Administrative Procedures Act is applicable to this case. Some "old" parts of the Administrative Procedures Act were repealed effective September 9, 1971 and, at the same time, some "new" parts of the Administrative Procedures Act went into effect. This case was pending in circuit court on September 9, 1971. Does the "old" or the "new" version of the Administrative Procedures Act apply?

In *Russell et al v. Pac. Maritime et al*, 9 Or App 402, 406, 496 P2d 252, Sup Ct *review denied* (1972), we held that:

> "• • • [T]he pre-September 9, 1971 procedures, including circuit court jurisdiction, apply to all cases of this type that were validly pending in circuit court on that date."

While the specific question in *Russell* was one of jurisdiction, we believe that holding to be applicable here.

The chronology in this case was as follows. The original petition for judicial review was filed May 7, 1970. After a demurrer was granted an amended petition was filed. After a motion to strike was granted in part, a second amended petition was filed on August 7, 1970. Following additional proceedings, this case was remanded to the Board on February 11, 1971. In compliance with the circuit court's remand order, a contested case hearing was held June 16, 17, 18 and 29, 1971. Based on the hearing record, the

Board made its final decision on September 7, 1971. By letter dated September 14, 1971, the administrative record was transmitted to the circuit court and filed therein September 16, 1971. The circuit court proceeded to decide the merits, upholding the Board's September 7, 1971 decision.

Thus it is apparent that all critical events in this case occurred before the September 9, 1971 effective date of the "new" Administrative Procedures Act. The original petition for judicial review was filed 16 months before that date. The order that the Board accord petitioner a contested case hearing was made seven months before that date. The hearing was concluded two months before that date. And the Board's final decision was made two days before that date. During all of this time the "old" Administrative Procedures Act was in effect. It is the law by which those events should be judged.

The only events that occurred after September 9, 1971, were: (1) the filing of the Board's final decision with the circuit court; and (2) the circuit court's decision on the merits. The latter does not make the "new" Administrative Procedures Act applicable. A circuit court's decision is always going to be rendered after September 9, 1971, in cases like *Russell et al v. Pac. Maritime et al,* supra.

The various briefs all simply assert that because the Board's final decision was filed in the circuit court after September 9, 1971, therefore the "new" Administrative Procedures Act is applicable. We disagree. Review of the Board's final decision was not in any way a new proceeding arising after September 9, 1971. It was the culmination of a single case that had been pending for 16 months on that date. The circuit

court had not lost jurisdiction when it remanded this case to the Board. This was the same lawsuit both before and after the remand. There is no basis for the assertion that the "new" Administrative Procedures Act applies.[6]

The "old" Administrative Procedures Act used the term "contested case" to describe those situations in which an agency was required to grant a hearing before making a decision. The "old" Administrative Procedures Act described the basic procedures that had to be followed at a contested case hearing, such as reasonable notice, right to counsel, right to present evidence and right to cross-examine adverse witnesses. *See,* ORS 183.420 to 183.460 (1969). Contested case was defined as:

> "• • • [A] proceeding before an agency in which the individual legal rights, duties or privileges of specific parties are required by statute or constitution to be determined only after an agency hearing at which such specific parties are entitled to appear and be heard • • •." ORS 183.310 (2) (1969).

Thus, in general, the "old" Administrative Procedures Act did not *per se* identify those situations in which a contested case hearing was required, but, instead, required examination of other statutes and constitutional authorities to determine when a contested case hearing was mandatory before an agency made a final decision.

There are, of course, numerous statutes governing various aspects of public employment. One of the

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[6] In view of our conclusion that the "old" Administrative Procedures Act governs, we express no view on the question of whether the terms of the "new" Administrative Procedures Act would produce a different result in this case—a question briefed at length by the parties.

universal characteristics of these various statutory schemes is the distinction between probationary and tenured public employes. Specifically, any individual public employe is generally in one of three groups: (1) those with permanent job security, i.e., tenured; (2) those with no job security, i.e., probationary; and (3) those with some, but not permanent job security. In general, the distinction is that, by statute, tenured public employes can only be discharged "for cause" established in a hearing, while probationary public employes can be discharged for any reason or no reason and have no right to a hearing on the grounds therefor.

2-4. Many examples are available to illustrate the contrasts between these different groups. State employes are either "classified," "unclassified," or "exempt."[1] ORS 240.195 to 240.210. All unclassified and exempt employes are in the second group, i.e., there are no statutory limits on the prerogative of the state to discharge such employes. At the beginning of their employment, classified employes "serve a trial period of not to exceed six months." ORS 240.405 (1). During this initial probationary period classified employes enjoy no significant statutory job security. *See*, ORS 240.410. After completing this probationary period, the employe becomes a "regular employe" within the meaning of ORS 240.560 (1), and thereafter can only be discharged "for cause," ORS 240.560 (4), defined as "misconduct, inefficiency, incompetence, insubordination, indolence, malfeasance or other unfitness to render effective service," ORS 240.555 (1). Also, a regular classified employe must be granted a

[1] The differences between "unclassified" and "exempt" state employes are not of any importance for present purposes—both groups are similarly situated in so far as their job security.

hearing on whether the statutory grounds exist for his discharge. *See,* ORS 240.560; *Phillips v. State Bd. of Higher Ed.,* 7 Or App 588, 490 P2d 1005 (1971), Sup Ct *review denied* (1972). In other words, a regular classified employe of the state enjoys permanent job security; by statute he can only be discharged for certain enumerated grounds and in accordance with certain established procedures.

5. A similar pattern exists for public employes in local governmental units. ORS ch 241 creates civil service requirements with which counties having a population of 300,000 or more must comply. ORS 241.020. When first hired by such a county, an employe "shall be on probation for a period * * * not to exceed one year if the position is in the police department of the office of the sheriff, otherwise not to exceed six months." ORS 241.265. After completing the required probationary period, the employe's "appointment shall be deemed permanent." ORS 241.275. Thereafter, a permanent employe can only be dismissed "for cause," ORS 241.425, 241.430, pursuant to statutory hearing procedures, ORS 241.435 to 241.445. Counties with a smaller population than 300,000 may but are not required to adopt such civil service rules and procedures. ORS 241.006. Thus, permanent employes in larger counties are part of that group of public employes which enjoys permanent job security. Probationary employes in larger counties and all employes in smaller counties which have not chosen to adopt a civil service system are part of that group of public employes which enjoys no job security. *See,* ORS 204.601 (2); *Schlichting v. Bergstrom,* 13 Or App 562, 511 P2d 846 (1973).

6. In school districts having a population of 100,-

000 or more, custodians, after serving a six-month probationary period, ORS 242.580, achieve permanent job security, ORS 242.590. Firemen, after serving a 12-month probationary period, ORS 242.766 (1), achieve permanent job security, ORS 242.768 (1), and thereafter can only be discharged "for cause," ORS 242.796, 242.798; *see, Myers/Sherwood v. Tualatin RFD,* 5 Or App 142, 483 P2d 95 (1971).

7. This general pattern obtains in the case of public elementary and secondary school teachers, albeit with a bit more detail and complexity. ORS ch 342. There is no provision for teacher job security in the smallest school districts, those having an average daily pupil attendance of less than 800. Teachers in intermediate-sized districts with average daily attendance of more than 800, but less than 4,500, have those rights and duties enumerated in ORS 342.508 to 342.553. They are initially hired on a series of three one-year contracts. *See,* ORS 342.508; *George v. School Dist. No. 8R,* 7 Or App 183, 490 P2d 1009 (1971). Thereafter, if rehired, they must be given three-year contracts. ORS 342.508. During the term of one-year or three-year contracts, a teacher can only be discharged for the reasons specified in ORS 342.530. But at the end of any contract period "the school board could decline to renew the contract for any reason." *George v. School Dist. No. 8R,* supra, 7 Or App at 195. Thus, teachers in such an intermediate-sized school district are an example of the group of public employes who have some, but not permanent job security.

8. Teachers in the largest school districts, those with average daily attendance of more than 4,500, are treated similarly to state employes. ORS 342.805 to 342.955. In such a school district a teacher serves a

probationary period of three years, ORS 342.815 (5), presumably with a series of one-year contracts, *see*, ORS 342.505, *cf.*, ORS 342.835 (1). It is not completely clear what the extent of a teacher's job security is during the term of his contracts while in this probationary period. *Compare*, ORS 342.835 (1) *with* ORS 342.530. It is clear that at the end of the term of the contracts during the probationary period a teacher has no job security.

> "The district board may, for any cause it may deem in good faith sufficient, refuse to renew the contract of any probationary teacher." ORS 342.835 (2).

If rehired after three years, a teacher achieves permanent job security. ORS 342.845. Thereafter, he can only be discharged for the grounds stated in ORS 342.865 and in accordance with the procedures stated in ORS 342.895 to 342.960.

As this survey of some of the statutory provisions governing public employment makes apparent, a feature common to all of the statutory schemes is that a new public employe serves an initial probationary period followed, in most cases, by the possibility of acquiring permanent job security. The probationary period, obviously, is designed to permit on-the-job observation and evaluation of the new employe's performance so that only those of demonstrated competence will acquire permanent job security. *See*, *Cammarata v. Essex County Park Comm'n*, 26 NJ 404, 412, 140 A2d 397 (1958):

> "It is difficult to evaluate the character, industry, personality, and responsibility of an applicant from his performance on a written examination or through cursory personal interviews. Knowledge

and intelligence do not alone [suffice] * * *. The crucial test of his fitness is how he fares on the job from day to day when suddenly confronted by situations demanding a breadth of resources and diplomacy. Many intangible qualities must be taken into account, and, since the lack of them may not constitute good cause for dismissal under a tenure statute, the [employer] * * * is entitled to a period of preliminary scrutiny, during which the protection of tenure does not apply, in order that it may make pragmatically informed and unrestricted decisions as to an applicant's suitability."

Because of this valuable role that probationary public employment can serve, statutory schemes that distinguish between tenured and probationary employes have been uniformly upheld against challenges based on the Equal Protection Clause of the Fourteenth Amendment. *Schlichting v. Bergstrom*, supra, and cases cited therein.

There are no detailed statutes governing the employment of academic personnel by the State Board of Higher Education. Instead, the legislature has granted the Board general authority in this matter:

"The State Board of Higher Education may, for each institution under its control:

"(a) Appoint and employ a president and the requisite number of professors, teachers and employes, and prescribe their compensation and tenure of office or employment.

"* * * * *

"(2) The State Board of Higher Education may, for each institution, division and department under its control:

"* * * * *

"(b) Enact rules and bylaws for the government thereof, including the faculty, teachers, stu-

dents and employes therein." ORS 351.070 (1)(a), (2) (b).[3]

Pursuant to this authority, the Board has adopted regulations covering employment matters. They conform to the general scheme discussed above.

9. The Board's academic employes have either "yearly tenure" or "indefinite tenure." Although there are no definitions of these terms in the regulations, it is apparent that indefinite tenure means an academic employe cannot be discharged except for cause. Also it is apparent that yearly tenure means that an employe can only be discharged for cause during the term of his one-year appointment, but can be discharged, i.e., not rehired, for any reason at the end of each year.

The regulations seem to contemplate that an academic employe will usually initially be hired with yearly tenure. Then at some point within the next six years a decision will be made as to whether he will be granted indefinite tenure.

10. This sketch of the Board's employment practices is distilled from the following regulations that were in effect at the times material to this case.[4]

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[3] State ex rel Kleinsorge et al v. Reid, 221 Or 558, 352 P2d 486 (1960), discusses the statutes governing the operations of the Board at length.

[4] All citations to the Board's regulations are to the provisions in effect at the time material to this case, all of which have since been replaced by new regulations. We cite the older regulations material to this case as "1969 Adm. Code."

We have previously treated the Board's 1969 Adm. Code as having the force of law. West v. Bowers, 11 Or App 364, 502 P2d 270 (1972), Sup Ct *review denied* (1973); Vandever v. State Bd. of Higher Ed., 8 Or App 50, 491 P2d 1198 (1971), Sup Ct *review denied* (1972). We continue to do so in this case.

"• • • All • • • [academic] employees • • • shall receive each year formal notification of conditions and terms of employment for the fiscal year beginning July 1. Such notification is sent out from the president's office. Unless otherwise specifically stipulated in individual notices, or otherwise provided herein, appointments or reappointments are for a period not beyond the fiscal year designated in the notice of appointment. The official form is approved by the chancellor's office • • •." 1969 Adm. Code, sec L-3-A (4).

"Full-time members of the academic staff appointed with the rank of assistant professor or above shall be employed on a one-year basis, and ordinarily are considered for indefinite tenure effective with the fourth year of service. It is recognized that at times it may be desirable to grant indefinite tenure, before the end of three years to persons appointed with the rank of associate or full professor. An annual review shall be made by the president of those persons eligible for promotion beyond the rank of assistant professor.

"If any appointment of an academic staff member • • • not on indefinite tenure, is to be terminated otherwise than for cause, he shall be given a timely notice of termination as follows: during the first annual appointment, at least three months' notice; thereafter, at least twelve-months' notice • • •. Annual appointment for a seventh consecutive year shall normally include the granting of indefinite tenure unless the seventh annual notice of appointment specifically provides otherwise.

"The provisions of this section shall apply to all appointments unless in individual cases there is a definite written understanding to the contrary, in which case the exception will be noted in the notice of appointment." 1969 Adm. Code, sec L-3-F.

"• • • The appointment of an academic staff member with indefinite tenure will not be termi-

nated for reasons other than for cause, except for financial exigency * * *." 1969 Adm. Code, sec L-3-FF (2)(b).

"* * * [Termination of employment—not for cause—staff members without indefinite tenure]. Appropriate notice of termination shall be provided staff members without indefinite tenure as set forth in Section L-3-F of the Administrative Code * * *." 1969 Adm. Code, sec L-3-FF (2)(c).

"* * * The appointment of an academic staff member, whether or not having tenure, may be terminated for cause as herein provided. 'Cause' shall be understood to include gross inefficiency, conviction of a felony, or conduct flagrantly unbecoming a faculty member." 1969 Adm. Code, sec L-3-FF (3)(a).

The regulations do not specifically define any standards governing an initial appointment to a faculty, or governing decisions whether to reappoint or not to reappoint a faculty member with yearly tenure, or governing whether to grant or deny indefinite tenure. *But cf.*, 1969 Adm. Code sec C-2:

"While not unmindful of other objects of state-supported institutions of higher learning, namely research and extension, or other service to the state, imparting instruction on the respective campuses is the primary and fundamental function of the institutions."

III

11. The above-discussed statutes are important in determining whether a public employe has a constitutional right, under the Due Process Clause, to a predischarge hearing. Specifically, tenured public employes do have a right to a hearing, but probationary public employes do not. *Board of Regents v. Roth*, 408 US 564, 92 S Ct 2701, 33 L Ed 2d 548 (1972); *Perry*

v. Sindermann, 408 US 593, 92 S Ct 2694, 33 L Ed 2d 570 (1972); *see also, Slochower v. Board of Education*, 350 US 551, 76 S Ct 637, 100 L Ed 692 (1956).

The *Roth* case involved a nontenured assistant professor in his first year of his first job teaching in the Wisconsin public higher education system. In accordance with the relevant Wisconsin statutes and regulations he was given timely notification that his contract would not be renewed for a second year. He then initiated an action in federal court contending he was entitled to a statement of reasons for his nonretention and a pretermination hearing to contest those reasons.

The Supreme Court held to the contrary. "The requirements of procedural due process apply only to the deprivation of interests encompassed within the Fourteenth Amendment's protection of liberty and property. • • •" 408 US at 569. The Supreme Court concluded that a public employer's decision not to retain a probationary employe did not ordinarily constitute a deprivation of liberty. "• • • It stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another. • • •" 408 US at 575. Also, the Supreme Court concluded that a public employer's decision not to retain a probationary employe did not ordinarily constitute a deprivation of property.

> "• • • To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people

rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

"Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. • • •

"• • • • •

"• • • [T]he terms of the respondent's appointment secured absolutely no interest in re-employment for the next year. They supported absolutely no possible claim of entitlement to re-employment. Nor, significantly, was there any state statute or University rule or policy that secured his interest in re-employment or that created any legitimate claim to it. In these circumstances, the respondent surely had an abstract concern in being rehired, but he did not have a *property* interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment." 408 US at 577-78.

The *Sindermann* case also involved a college professor. He had been employed on a series of one-year contracts in the Texas public higher education system for 10 years. During his tenth year of teaching he was given timely notice that his contract would not again be renewed. Like Professor Roth, Professor Sindermann then went to federal court urging he was entitled to a statement of reasons for his nonretention and a pretermination hearing to contest those reasons.

His complaint alleged that while the public junior college where he had been employed had no

formal tenure system, it "had a de facto tenure program." 408 US at 600. He alleged this program was based on a provision "in the college's official Faculty Guide" and on "* * * *guidelines promulgated by the Coordinating Board of the Texas College and University System that provided that a person, like himself, who had been employed as a teacher in the state college and university system for seven years or more has some form of job tenure.* * * *" (Emphasis supplied.) 408 US at 600.

The Supreme Court held that if Professor Sindermann could prove these allegations he would thereby establish that he "* * * had no less a 'property' interest in continued employment than a formally tenured teacher * * *," 408 US at 601, and "* * * such proof would obligate college officials to grant a hearing at his request, where he could be informed of the grounds for his nonretention and challenge their sufficiency." 408 US at 603.

12. As previously noted, numerous statutes and regulations entitle certain public employes to permanent job security, i.e., they can only be discharged for enumerated causes. For employes who have achieved tenured status, these statutes create property interests within the meaning of the Fourteenth Amendment. Such employes cannot be deprived of this property interest without first having a hearing that satisfies due process requirements. *Perry v. Sindermann*, supra.

13, 14. Also as previously noted public employes when first hired commonly are required to serve a probationary period. This can vary in length from up to six months for state classified employes to up to six years for professors employed by the State Board of Higher Education. Other public employes are in posi-

tions for which no provision has been made for ever acquiring permanent job security. *See, Schlichting v. Bergstrom,* 13 Or App 562, 511 P2d 846 (1973). Employes who are in probationary status, either temporary or permanently, have no property interest within the meaning of the Fourteenth Amendment. The constitution does not require that they be granted a pretermination hearing or be informed of the reasons for their discharge.[9] *Board of Regents v. Roth,* supra.

15, 16. Thus in Oregon, public employe tenure rights arise solely from statutes or, in the case of the Board, regulations adopted pursuant to a statutory delegation of authority. *See,* Part II, supra. It is these tenure rights based on statute or regulation that create property interests that cannot be withdrawn without a due process hearing. Employment contracts of public employes may create rights to continued employment over and above that provided by statute or regulation. But such an employment contract, standing alone, does not create the kind of interest that triggers the requirement of a due process hearing before the government withdraws the benefits of the contract, i.e.,

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[9] By statute the legislature could extend any additional procedural rights it wished to probationary employes. Much of the argument before us relates to whether the legislature intended to do just that by way of the 1971 amendments to the Administrative Procedures Act, a question we do not reach. *See,* n 6, supra. Or the Board could, by regulation, expand the procedural rights of its probationary employes; Toney v. Reagan, 467 F2d 953 (9th Cir 1972), *cert denied sub nom* Mabey et al. v. Reagan et al., 409 US 1130 (1973), discusses the details of regulations whereby nontenured faculty members were granted a right to a hearing if their appointments were not renewed. Due process always speaks in terms of the minimum necessary procedures, whereas the legislature or the Board may well be concerned with the best possible procedures.

Also, several recent cases have involved hearing rights based on collective bargaining agreements. E.g., Curbelo v. Macomb College Trustees, 38 Mich App 432, 196 NW2d 843 (1972).

breaches it. In such a situation, the public employe's remedies are measured by the law of contracts, not by constitutional law.

IV

With these principles in mind, we turn to the question of whether petitioner was entitled to a contested case hearing before the Board terminated his employment effective June of 1970. This depends upon whether the Board was "required by statute or constitution" to hold a hearing before deciding to terminate petitioner's employment. ORS 183.310 (2) (1969).

17. The Board was not required by statute to hold such a hearing. As discussed in Part II, supra, under the state civil service laws unclassified employes have no statutory right to a hearing on the grounds for their dismissal. Unclassified employes include all academic employes of the Board. ORS 240.207 (1)(b)(E).

Whether the Board was required by constitution to accord petitioner a pretermination hearing depends upon the existence and extent of petitioner's entitlement to future employment under the Board's regulations. *See,* Part III, supra. When initially hired for the 1967-68 academic year, petitioner had a one-year appointment, i.e., what the Board's regulations term "yearly tenure." When reappointed for the 1968-69 and 1969-70 academic years petitioner also had yearly tenure. By the provisions of the relevant regulations, *see,* Part II, supra, these appointments created property interests in the sense that petitioner could not have been discharged during any of those academic years without the Board's first holding a hearing on the reasons for his discharge. But also under the Board's regulations petitioner could have been dis-

charged at the end of any of those years for any reason or no reason, and he would have no right to a hearing on the grounds for his discharge.[9]

18. But that is not the end of our inquiry. One of the Board's regulations in effect at the times material to this case provided:

> "If any appointment of an academic staff member * * * not on indefinite tenure, is to be terminated otherwise than for cause, he shall be given a timely notice of termination as follows: * * * at least twelve-months' notice * * *." 1969 Adm. Code, sec L-3-F

The effect of this regulation is to entitle the Board's academic employes to continued employment unless and until they receive timely notice of termination in accordance with the requirements of the regulation. *See, Zimmerman v. Minot State College,* 198 NW2d 108 (ND 1972); *Pima College v. Sinclair,* 17 Ariz App 213, 496 P2d 639 (1972).

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[9] It may seem anomalous that a professor on yearly tenure has no right to a hearing if dismissed at the end of his sixth year of teaching at Oregon State, while many courts have held that a college student cannot be expelled at any point without a hearing. *See,* Dixon v. Alabama State Board of Education, 294 F2d 150 (5th Cir), *cert denied* 368 US 930 (1961); *see generally,* Wright, *The Constitution and the Campus,* 22 Vand L Rev 1027 (1969); Annotation, 58 ALR2d 903, 905 (1958). It may seem anomalous that a professor employed by the Board, unless and until granted indefinite tenure, enjoys less job security than the maintenance employe in the University of Oregon power plant involved in Beistel v. Pub. Emp. Relations Bd., 6 Or App 115, 486 P2d 1305 (1971). It may seem anomalous that under the Board's regulations a university professor can have less job security than do virtually all teachers in this state's public primary and secondary schools under ORS ch 342.

To the extent that these anomalies, if that they be, are the product of statutes and regulations, the legislature or the Board, respectively, are the appropriate forums in which to question the wisdom of such results.

The Board's regulations are thus different from the comparable Wisconsin regulations involved in the *Roth* case. In Wisconsin public universities:

> "'• • • The employment of any staff member for an academic year shall not be for a term beyond June 30th of the fiscal year in which the appointment is made.' • • •" 408 US at 566, n 1.
>
> "'• • • February first is established throughout the State University system as the deadline for written notification of non-tenured faculty concerning *retention or non-retention* for the ensuing year. The President of each University shall give such notice each year on or before this date.'" 408 US at 567-68, n 4. (Emphasis supplied.)

Under these rules requiring formal notification of "retention or non-retention" it would appear that silence would be tantamount to nonretention. By contrast, under the Oregon State Board's rules, silence, i.e., failure to give twelve months' notification of nonretention, is tantamount to retention.

19. The Board's regulations are unclear as to whether the twelve months' notification requirement means twelve months before the beginning of the fiscal year, referred to in 1969 Adm. Code, sec L-3-A (4) as being July 1, or twelve months before the beginning of the academic year, referred to in 1969 Adm. Code, sec L-3-B as being September 16, or twelve months before the effective date of the termination, i.e., the end of the academic year, referred to in 1969 Adm. Code, sec L-3-B as being June 15. The last possibility seems most plausible, that is, in order to terminate petitioner's employment effective June 1970, it would have been necessary to so notify him by June 1969. However, we need not resolve this ambiguity in the Board's regulations because under any possible con-

struction of the required notification date petitioner did not receive timely notification of termination.

The Board argues that Dean Ward's letter of February 25, 1969, to petitioner complied with the notice requirements of 1969 Adm. Code, sec L-3-F, i.e., that petitioner received 16 months' notice his employment would be terminated effective June 1970. Petitioner contends the first formal notification of termination he received was the Oregon State President's letter of September 24, 1969, and that this notification was too late under 1969 Adm. Code, sec L-3-F to terminate his employment effective June 1970. We agree with petitioner.

20. As in *Wallis v. Crook County School Dist.*, 13 Or App 174, 509 P2d 44 (1973), the relevant inquiry is not whether petitioner had knowledge of the possibility that he would be discharged; rather, the relevant inquiry is whether petitioner received timely notice of termination in compliance with 1969 Adm. Code, sec L-3-F. It seems obvious that the notice of termination contemplated by 1969 Adm. Code, sec L-3-F is notice from somebody with authority to make the decision to terminate. We conclude that there is no authority to terminate a professor's employment below the University President level.

As previously noted, Part II, supra, the Board has explicit statutory authority to "employ • • • professors • • • and prescribe their • • • tenure of • • • employment." ORS 351.070 (1)(a). Presumably, there would be no problem with the Board's delegating some or all of its authority over personnel decisions to subordinates. *Cf., Beistel v. Pub. Emp. Relations Bd.*, 6 Or App 115, 486 P2d 1305 (1971). However, the Board's regulations are obscure as to whether there has, in fact, been such a delegation.

Following the tenor of ORS 351.070 (1)(a), one part of the regulations seems to provide that the Board has all control over personnel decisions:

> "• • • Appointments to positions in the academic classification in the salary budget are made by the board upon the recommendation of the department head, the dean, the executive head of the institution, and the chancellor." 1969 Adm Code, sec L-3-A (1).

However, 1969 Adm. Code, sec F-2-A provided:

> "The chancellor shall have complete authority • • • over the selections, appointment, promotion, salaries, transfers, suspensions, and dismissals of all officers, members of the faculties, and other employees of the system and its component divisions, exercising this authority by making recommendations to the board, in which rests the sole power of decision. • • •"

This section appears to be internally inconsistent; it starts with the statement that the chancellor has "complete authority," but concludes by stating the Board has "the sole power of decision." Moreover, 1969 Adm. Code, sec G-1-B further muddies the waters by seeming to give each university president a measure of control over personnel decisions:

> "The president [of each university] shall • • • have the initiative in the selection of all officers, members of the faculties, and other employees of his institution, subject to the approval of the chancellor. He shall exercise this authority in case of subordinate positions by filling vacancies as they may occur upon approval of the chancellor • • • when the salary outlay is within the budget appropriations provided by the board for such positions, and in case of major positions by making recommendations of appointment through the chancellor to the board, in which rests the sole

power of election and confirmation of appointment."

Several of the above-quoted regulations deal primarily or exclusively with initial hiring decisions. The Board's regulations depart from their usual crypticness and deal with the subject of termination procedures at some length. Most of the detail relates to terminations for cause. After a hearing before an ad hoc seven-member faculty committee, the "institutional executive" (presumably meaning the president) makes a decision. 1969 Adm. Code, sec L-3-FF-3 (i). If that decision is adverse to the teacher, he can appeal to the Board and

> "The State Board of Higher Education may conduct such hearings as it deems proper for its consideration of an appeal, or it may refer the appeal to a committee of Board members for consideration and recommendation. • • •" 1969 Adm. Code, sec L-3-FF-3 (j).

The regulations contain no parallel provisions applicable to terminations not for cause. Thus, there is no answer in the regulations to the question of who makes a decision to terminate, i.e., not to renew the contract of a professor on yearly tenure.

The record is more illuminating. The proceedings at the Mathematics Department level—the Committee vote that petitioner be granted indefinite tenure, the vote of the tenured faculty that petitioner be granted indefinite tenure, and the Chairman's personal endorsement—were all phrased as recommendations and passed up the chain of command as such, for a final decision to be made at a higher level. After "consulting" with his Advisory Committee, Dean Ward's letter of February 25 stated:

> "• • • [Y]ou will not be *recommended* by this

> office to the Dean of Faculty for reappointment to the faculty of the Department of Mathematics after the academic year 1969-70." (Emphasis supplied.)

This, too, was phrased as a recommendation to be passed up the chain of command for a final decision to be made at a higher level. The record describes the Dean of Faculty as the "chief academic personnel officer for" Oregon State, but does not tell us what his contributions were to the decision to discharge petitioner.

Confusion arises when we reach the University President level. The President's September 24 letter to petitioner stated:

> "• • • [T]he executive office finds no sound academic basis for *reversing* the *recommendation* of the School of Science. • • •" (Emphasis supplied.)

The same letter contained several references to "Dean Ward's decision." Also, at the March 1970 hearing before the Board's Academic Affairs Committee the University President said there had been a "delegation of responsibility" to Dean Ward, and that the real issue was whether he (the President) had been correct in not overturning Dean Ward's decision.

However, we find no basis for concluding Dean Ward or anybody else below the University President level had authority to make a final decision to terminate petitioner's employment. Significantly, the same analysis was in the Board's answer filed in the circuit court in this proceeding:

> "• • • [R]espondent admits that it was within the scope of Dean Ward's authority to make *recommendations* to Acting University President

> Young concerning petitioner's continued employment by University and it was within the scope of Acting University President Young's authority *to act* upon such recommendation unless such act should be disapproved by respondent * * *." (Emphasis supplied.)

Therefore, the statement in the President's September 24 letter that

> "* * * we regard Dean Ward's letter of February 25, 1969, to you as a letter of timely notice of non-reappointment in accordance with the provisions of Section L-3-F of the Administrative Code of the Oregon State Department of Higher Education.",

had no basis in law. It was impossible for Dean Ward's February 25 letter to be "timely notice of non-reappointment" because under the Board's regulations Dean Ward did not have authority to make such a decision. It was the President's September 24 letter that was the actual notice of termination.

However, the President's September 24 letter was not adequate notice to terminate petitioner's employment before the end of the 1970-71 academic year. When June 1969 passed without petitioner's having been told his employment would be terminated effective June 1970 by somebody with authority to make that statement, he then had an entitlement to continue employment, based on the Board's regulations, until June 1971. The President's September 24 letter was sufficient notice to terminate petitioner's employment in June 1971; that letter was not sufficient notice to terminate petitioner's employment sooner than June 1971.

21. Since the Board's regulations created an entitlement to continued employment until June 1971, the

Board was required by the constitution to accord petitioner a hearing when it sought to discharge him before that date. *See,* Part III, supra. Since a hearing was required by the constitution, the Administrative Procedures Act, ORS ch 183, required that the hearing should be a contested case hearing conducted in accordance with the requirements of the Administrative Procedures Act. *See,* Part II, supra.

In spite of petitioner's entitlement to continued employment until June 1971, the Board discharged him effective June 1970. It did not accord petitioner a proper hearing before doing so. The hearing before a committee of the Board in March 1970 did not comply with the requirements of the Administrative Procedures Act. Just as one example, cross-examination was not permitted in violation of ORS 183.450 (3) (1969).

In summary, the Board's June 1970 discharge of petitioner was in violation of his constitutional right to a hearing before being deprived of his property interest in continued employment until June 1971, and in violation of his statutory right under the Administrative Procedures Act that such a hearing be conducted in accordance with that statute.

23, 24. There remains the question of an appropriate remedy, an issue on which the copious briefs before us are not very helpful. Normally, a public employe discharged in a manner that violates the employe's rights to a pretermination hearing would be entitled to reinstatement. *Greene v. Howard University,* 412 F2d 1128 (DC Cir 1969). But reinstatement would only be for the period of the employe's entitlement to continued employment under relevant statutes and regulations. Here petitioner's entitlement to continued em-

ployment ended in June 1971. Since that date has long since passed, reinstatement is not the appropriate remedy in this case.

25-28. Instead, it appears that petitioner is entitled to money damages in the form of what his salary would have been for the 1970-71 academic year less the amounts he did earn or reasonably could have earned during that period. *Zimmerman v. Minot State College,* supra. This would be the natural result of application of the principle that the victim of an unconstitutional act is entitled to be restored to that which he lost. *Cf. Bivens v. Six Unknown Fed. Narcotics Agents,* 403 US 388, 91 S Ct 1999, 29 L Ed 2d 619 (1971). However, as noted we have not had the benefit of full argument on the remedy issue, and there is no evidence in the record on petitioner's mitigation, i.e. what he did earn or reasonably could have earned during the 1970-71 academic year. Therefore, upon remand the circuit court will explore and, if necessary, hear evidence on the remedy issue. In the unusual circumstances of this case, we believe the circuit court has authority to do so under the terms of ORS 183.480 (6) (1969).[9]

V

In summary, we hold: (1) The notice of termi-

---

[9] ORS 183.480 (6) (1969) provided:

"The review shall be conducted by the [circuit] court without a jury as a suit in equity and shall be confined to the record, except that, in cases of alleged irregularities in procedure before the agency, not shown in the record, testimony thereon may be taken in the court. The court shall, upon request, hear oral argument and receive written briefs."

Once a court of equity acquires jurisdiction, it can award complete relief. Ruby v. West Coast Lumber Co., 139 Or 388, 10 P2d 358 (1932). Even if equitable relief is denied, money damages can be awarded. Fisk v. Leith, 137 Or 459, 299 P 1013, 3 P2d 335 (1931).

nation of employment petitioner received was too tardy, under the Board's regulations, to terminate petitioner's employment effective June 1970; (2) therefore under the same regulations petitioner had an expectation of continued employment until June 1971; (3) petitioner's expectation of continued employment was a property interest within the meaning of the Due Process Clause—he could not be deprived of continued employment until June 1971 without a pretermination hearing; (4) such a hearing had to comply with the requirements of the Administrative Procedures Act, ORS ch 183; (5) petitioner was not accorded a pretermination hearing that complied with the Administrative Procedures Act. Thus, to the extent that the circuit court affirmed the petitioner's discharge effective June 1970, that determination is reversed and remanded for further proceedings on petitioner's damages for the 1970-71 year. In all other respects the circuit court's decision is affirmed.

Affirmed in part; reversed and remanded in part.

14 Or App 179

JUDGMENT ON INITIAL APPEAL

STATE OF OREGON

COURT OF APPEALS
(June 27, 1973)

MICHAEL PAPADOPOULOS, *Appellant-Cross-Respondent,*	No. CA 1747
v.	MANDATE
OREGON STATE BOARD OF HIGHER EDUCATION, *Respondent-Cross-Appellant.*	ON APPEAL FROM MARION COUNTY No.70049

This cause having come on to be heard

on appeal and having been duly submitted and considered:

IT IS HEREBY ADJUDGED AND ORDERED that the decision entered below in this cause is affirmed in part; reversed and remanded in part.

IT IS FURTHER ORDERED that appellant-cross-respondent recover from respondent-cross-appellant damages costs and disbursements in this court in the amount of $417

The cause is remanded for further proceedings pursuant to law and this Court's decision and opinion herein.

Entered at Salem,Oregon this 27th day of June,1973.

_____
Clerk

ORAL FINDINGS
on
DENIAL OF MOTION TO AMEND PLEADINGS

STATE OF OREGON

MARION COUNTY CIRCUIT COURT
(June 7,1979)

Page A of TRANSCRIPT OF PROCEEDINGS held before the court on June 7,1979 in No.70049, *Papadopoulos v. Bd. of Higher Education.*

"(Following opening statements and legal arguments by counsel, the following proceedings were had, to wit:)

THE COURT:

"Well,I'm going to deny your motion to amend the petition. This case was filed in May *** 1970. It went through the processes of this Court; was appealed to the Court of Appeals;was remanded for certain purposes.

"After that, Dr. Papadopoulos filed the petition for rehearing,per order of the Court of Appeals;petition reviewed by the Oregon Supreme Court. I think some sort of motion to clarify the mandate in the Court

of Appeals; the action of Federal District Court; I guess appeal to the Circuit Court of Appeals; from there to the U.S.Supreme Court; and another suit in Multnomah County Circuit Court.

"I have read and reread carefully this morning the decision of 14 Or Appeals; and I must conclude that the purpose of the hearing this morning and the only thing left for this Court to do in this case is as directed in that opinion; to determine what Dr. Papadopoulos' salary would have been in 1970-71 academic year, less what he did or perhaps reasonably could have earned.

"So that's the extent of the hearing I'll conduct this morning. It will be addressed to those issues. "

FINAL JUDGMENT

STATE OF OREGON
MARION COUNTY CIRCUIT COURT
(July 6,1979)

MICHAEL PAPADOPOULOS, *Plaintiff,*	)	
	)	No. 70049
v.	)	
	)	JUDGMENT ORDER
OREGON STATE BOARD OF HIGHER EDUCATION, *Defendant.*	)	

This matter came before the court on remand from the Court of Appeals of the State of Oregon for determination of the amount the petitioner is entitled to recover from the respondent as money damages in the form of what his salary would have been for the 1970-71 academic year less the amount he did earn or reasonably could have earned during that period, pursuant to the findings and opinion of the Oregon Court of Appeals.

This matter having come before the court for hearing on June 7, 1979, the petitioner being represented by Dennis Sarriugarte,and the respondent represented by Marcus Ward,

Assistant Attorney General, and the Court having received testimony and other evidence as to the appropriate amount:

NOW THEREFORE it is the finding of the Court that the petitioner is entitled to receive from the respondent the amount of $18,333 as money damages for the 1970-71 academic year including his usual summer employment.

It is accordingly the order of the court that judgment be and hereby is entered in favor of the petitioner and against the respondent for the amount of $18,333.00 with no cost award to either party.

Dated this 6th day of July, 1979

Val D. Sloper
Circuit Judge

POST-JUDGMENT OPINION

STATE OF OREGON

MARION COUNTY CIRCUIT COURT
(September 12, 1979)

Re: Papadopoulos v. Bd.of Higher Education No.70049.

This matter was last before the Court on June 7, 1979 for a hearing directed by the Court of Appeals (*Papadopoulos v. Bd. of Higher Education, 14 Or App 130*) to determine plaintiff's damages for the academic year 1970-71.

At the time of the hearing the plaintiff filed a motion to amend the petition that had been originally filed in May of 1970.

Since the time of the filing of the original petition the plaintiff has exhausted every conceivable remedy in both the State and Federal courts, and the hearing held on June 7 had been continued many times following the Court of Appeals' decision while the plaintiff was attempting to get a rehearing in the Court of Appeals, petition for review in the Supreme Court for the State of Oregon as well as other cases referred to above which were filed in Multnomah County Circuit Court and the U.S.

District Court in Portland.

At the time of the hearing on June 7, the Court denied the motion to amend the the petition and proceeded to have an evidentiary hearing as mandated. At the conclusion of that hearing the Court had determined that plaintiff was entitled to a certain money award for the 1970-71 school year, and on July 6, 1979, an order was filed entering a judgment on behalf of the plaintiff.

Following that time and on July 23, 1979, the plaintiff filed a motion to reopen the case, and on August 3, a motion to reconsider the judgment of July 6. Without going into the long and difficult legal history of this case, of which the plaintiff, his counsel and the defendant are fully aware, it is the opinion of the Court that the plaintiff's motions to reopen the case and to reconsider the judgment should be and the same hereby are denied.

Counsel for the defendant is directed to prepare a proper order for the Court's signature.

Val D. Sloper
Circuit Judge.

POST-JUDGMENT ORDER

STATE OF OREGON
MARION COUNTY CIRCUIT COURT
(September 24, 1979)

MICHAEL PAPADOPOULOS, *Plaintiff,*	)	No. 70049
v.	)	
OREGON STATE BOARD OF HIGHER EDUCATION, *Defendant.*	)	ORDER

This matter came before the Court upon Plaintiff's July 13,1979 motion to re-open the above-entitled case and Plaintiff's August 3, 1979 motion to reconsider the judgment of July 6.

Having considered the long and difficult legal history of this case and noting that Plaintiff has exhausted all legal

remedies available to him in both the federal and state courts, and the court now being fully advised in the premises:

IT IS HEREBY CONSIDERED AND ORDERED that the motion to reopen and the motion to reconsider be and both of them hereby are, denied.

Val D. Sloper
Circuit Judge

Federal Opinion in Companion Case
(unreported)

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON No.75-497

(January 5,1976)

MICHAEL PAPADOPOULOS,
Plaintiff,

vs.

OREGON STATE UNIVERSITY;OREGON STATE BOARD OF HIGHER EDUCATION; RAY T.YASUI,JANE CARPENTER,GEORGE H.COREY,ROBERT D.HOLMES,ELIZABETH H.JOHNSON,PHILIP A.JOSS,GEORGE H. LAYMAN,VALERIE McINTYRE, W.PHILIP McLAURIN,MARC F.MADEN, JOHN D. MOSSER, ANCIL H. PAYNE, LOUIS B. PERRY, JOHN W. SNIDER, LORAN L. STEWART and E.G. WESTERDAHL II, *in their individual capacities*

and in their capacities as members or as ex-members of the Oregon State Board of Higher Education; ROY E.LIEUALLEN, *in his individual capacity and in his official capacity as Chancellor of the Oregon State Board of Higher Education;* ROBERT W.MACVICAR,*in his individual capacity and in his official capacity as President of Oregon State University;*ROY A. YOUNG and JAMES H.JENSEN,*in their individual capacities and in their capacities as ex-presidents of Oregon State University;*and DAVID B. NICODEMUS, *in his individual capacity and in his official capacity as Dean of Faculty of Oregon State University,*

Defendants.

Michael Papadopoulos, *pro se.*

Lee Johnson, Attorney General of Oregon, John Leahy, Tim Norwood, Assistant Attorneys General, *attorneys for defendants.*

SKOPIL, Judge:

INTRODUCTION

The plaintiff, Michael Papadopoulos claims that the failure of the defendants Oregon State University, Oregon State

Board of Higher Education, certain members and ex-members of the Oregon State Board of Higher Education, Roy E. Lieuallen,Robert W.MacVicar,Roy A.Young, James H.Jensen and David R.Nicodemus to renew his teaching contract or to grant him tenure denied him certain constitutional rights.

Plaintiff claims that the defendants Nicodemus,Jensen,Young MacVicar,Lieuallen, Corey,Holmes,Johnson,Joss,Layman,Mosser, Snider,Stewart,Westerdahl and others conspired to deny plaintiff equal protection of the laws or equal privileges and immunities under the laws. He contends that these defendants discriminited against him because of his membership and participation in pacifist activities, the anti-war movement, and movements apposing racial inequality.

As to the other defendants, plaintiff contends that their actions deprived him

of his rights of due process, equal privileges and immunities, and that their action was in retaliation for plaintiff's exercise of his right to freedom of speech.

A motion to dismiss or,in the alternative,for summary judgment was filed on behalf of all defendants. It alleges that the action is barred by the applicable statute of limitations, that the defendants are not persons subject to suit under the Civil Rights Act, that the defendants are immune from suit pursuant to the 11th Amendment, and that the plaintiff is barred by res judicata - collateral estoppel.

Jurisdiction is based on 28 USC Section 1331,1332 and 1343.

FACTS

The plaintiff had been employed as a math professor at Oregon State University. His contract expired in March of 1970.In early 1970 he was told that when his contract expired he would not be granted tenure at Oregon State University. He

appealed that decision to the Board of Higher Education. In his appeal he asserted that Oregon State failed to employ proper procedures in its action against him. The Board's Academic Affairs Committee heard the appeal.The committee concluded that proper procedures had been followed. The Board of Higher Education adopted the committee's findings.

PRIOR COURT ACTION

The plaintiff sought review of the proceedings in the state circuit court. The state court found that the Board of Higher Education was subject to the Oregon Administrative Procedures Act,ORS Ch 183. The court decreed that the Board's inquiry should not be limited to purely procedural matters. The Board was directed to conduct a hearing on plaintiff's termination. In compliance with the court's order the Board made

"1) That the procedure followed by the Oregon State University administration concerning the non-renewal of the appointment of Dr. Papadopoulos and concerning the denial of tenure to him complied with procedural due process in all respects.

"2) That there was substantial evidence to justify the finding by the administration at Oregon State University that Dr.Papadopoulos did not comply with the standards of Oregon State University School of Science for production of scholarly research.

"3) That the administration at Oregon State University did not base its decision to deny Dr. Papadopoulos indefinite tenure and a renewal of his academic appointment on any conduct protected by the constitution and laws of the United States of America and the State of Oregon.

"and conclusion

"That the decisions of Oregon State University not to grant indefinite tenure to Dr. Papadopoulos and not to renew his academic appointment are affirmed."

Plaintiff challenged the decision. (Oregon Administrative Procedure Act, ORS ch 183). He claimed:

"(a) That the decision not to renew petitioner's contract was either arbitrary or made for the purpose of retaliating against petitioner for the exercise of his constitutionally protected rights of free speech as stated in paragraph II

of this Second Amended Petition for Judicial Review.

"(b) That the Board failed and refused to review the criteria employed by Acting President Young in making his decision against renewal of petitioner's contract.

"(c) That the Board failed to act impartially.

"(d) That the Board failed to exercise discretion judiciously.

"(e) That petitioner was denied a hearing on the reasons for non-renewal of his contract.

"(f) That the Board did not comply with the procedural requirements of Chapter 183 of Oregon Revised Statutes, as specified in paragraph VII of this Second Amended Petition for Judicial Review.

"(g) That petitoner was not given timely notice of termination of his employment."

Defendants' Exhibit No.5

The Board's decision was affirmed. Circuit Judge Val D. Sloper concluded:

"1. There was no denial of due process concerning the non-renewal of the appointment of the plaintiff, and denial of tenure to him; and

"2. The action of Oregon State University in refusing to renew the plaintiff's contract and denying him tenure was based on his academic record, and not on constitutionally permissible conduct."

Defendants' Exhibit No.1

Plaintiff then appealed to the Oregon Court of Appeals. It affirmed except on the issue of notice to the plaintiff prior to his termination. The Court of Appeals remanded the case to determine to what damages plaintiff was entitled because of imporper notice of termination. Thereafter plaintiff filed a petition for rehearing before the Oregon Court of Appeals, a petition for review by the Oregon Supreme Court and a petition for certiorari to the United States Supreme Court, all of which were denied.

CONCLUSION

laintiff now seeks to relitigate his case in the federal court. He reasserts issues already determined or issues he should have raised in his administrative or judicial hearings. This he cannot do. *Angel v. Bullington 330 US 183 (1947). Scoggin v. Schrunk,522 F2d 436 (9th Cir. 1975), Hutcherson v. Lehtin, 485 F2d 567*

(9th Cir.1973); Francisco Enterprises v. Kirby, 482 F2d 481 (9th Cir.1973). All cases must have an ending. Plaintiff has already had his day in court. Res judicata - collateral estoppel is applicable. I need not consider the other issues raised.

Defendant' motion for summary judgment is granted.

December 30,1975

Otto K.Skopil
US District Judge

Entered on January 5,1976.

Judgment in Companion Case

(January 5, 1976)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

MICHAEL PAPADOPOULOS, *Plaintiff,*	)	Civil No. 75-497
vs.	)	
OREGON STATE UNIVERSITY, *et al.,* *Defendants.*	)	SUMMARY JUDGMENT

Based on the opinion granting defendant's motion for summary judgment,

IT IS ORDERED AND ADJUDGED that the action is dismissed.

Dated: January 5,1976

Robert M.Christ
Clerk of Court

Entered on January 5,1976.

Appellate Opinion in Companion Case
(August 18,1977)

Papadopoulos v. Oregon State University, et al., 566 F2d 1183 (9th Cir.1977-*unrptd.*)

Before WRIGHT & KILKENNY,Circuit Judges, and HARRIS, Senior District Judge.

MEMORANDUM

Papadopoulos claims a denial of due process in the University's decision not to retain him as a professor of mathematics at the expiration of his three-year contract. He also alleges that non-retention was not based on his academic performance but rather was retaliation for his exercise of free speech. The district court granted summary judgment for the defendants, holding that the

action was barred by subject preclusion. We agree.

The Oregon Courts and administrative bodies already have adjudicated the rights of the parties. The Court of Appeals upheld the Board of Higher Education's affirmance of the University's decision not to grant tenure and its finding of no civil rights violation.

The Court of Appeals, however, also held that Papadopoulos had not received timely notice of termination and remanded the case to the Marion County Circuit Court for proceedings to assess damages. *Papadopoulos v. Bd. of Higher Ed.,14 Or App 130, 511 P2d 854 (1973).* The Oregon Supreme Court denied review and the United States Supreme Court denied a writ of certiorari. *417 US 919 (1974).*

It is clear that Papadopoulos has had a full opportunity to litigate his grievance. He is entitled to no more. *Scoggin v. Schrunk,522 F2d 436,437(9th Cir.1975).* AFFIRMED.

US SUPREME COURT DECISION in COMPANION CASE

In The

SUPREME COURT
OF THE UNITED STATES
(February 21, 1978)

434 US 1069

PAPADOPOULOS v. OREGON STATE UNIVERSITY, et al., No.77-913. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit DENIED.

OPINION IN SECOND COMPANION CASE

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH
(September 2,1977)

MICHAEL PAPADOPOULOS, Plaintiff	)	No.A7606-08273
vs.	)	
OREGON STATE UNIVERSITY, et al, Defendants	)	ORDER

Defendants' Motion for Summary Judgment came on for regular hearing before the Hon.Philip J. Roth,Judge of the

above-entitled Court. Defendants assert that all issues raised in the present proceeding have been decided adversely to plaintiff in the prior cases in Marion County and the Federal District Court.

Res judicata precludes litigation of all issues that were raised or should have been raised in the initial proceeding. The Oregon Supreme Court has recently broadened the scope of res judicata in Oregon in *Dean v. Exotic Veneers Inc., 271 Or 188 (1975)*, and commented about the policy underlying res judicata:

> "The principal purpose of res judicata are prevention of harassment of defendants by successive legal proceedings as well as economy of judicial resources. Its scope is related to the limits upon the various forms of relief which may be requested in one proceeding and the limitations upon amendments to pleadings during trial. As permissible joinder of requests for various forms of relief become broader and more liberal, the reasons for res judicata dictate that parties to actions be required

> to make use of of such liberal procedures and not be permitted to protract litigation through a multiplicity of suits or actions which can be disposed of in one proceeding.

After giving careful scrutiny to the file in the present case and comparing it with issues raised in the previous proceedings, the court is of the opinion that res judicata does apply.

Plaintiff's Third Amended Complaint basically alleges five causes of action: conspiracy to deny plaintiff's legal rights; breach of contract based on misrepresentation; defamation; interference with contract; and violation of constitutional rights. While it is not clear from the record whether the conspiracy and defamation allegations were raised in the Marion County proceedings, it is clear that all issues were alleged in the Federal Court action (No.75-497). In particular, with regard to the allegations of defamation in Count III of plaintiff's

Third Amended Complaint, the same allegations are found are found in plaintiff's Amended Complaint in Federal Court in Paragraphs 20(a),20(e),20(h) 20(j), 23 and 24. With regard to the conspiracy allegations contained in Count I of plaintiff's Third Amended Complaint, the same are found in Paragraphs 20(b),20(f), 20(k),20(m),21,23 and 24 of the Federal Amended Complaint.

As defendants point out,this Court must give res judicata effect to the summary judgment in the Federal Court even though it might feel that the basis for that decision was erroneous. *Treinies v. Sunshine Mining Co. 308 US 66 (1939); Morley v. Morley 24 Or App 77,78 (1976).* Plaintiff acknowledges the effect of summ summary judgment in his Statement of Points in Support of a Motion to Reconsider filed in the Federal Court action. In discussing the Federal Court ruling, plaintiff comments:

> "Summary judgment is final and on the merits. If undisturbed, summary judgment herein bars from future litigation and with finality every issue which plaintiff has brought or could have brought herein to determine his rights deriving from a period of service at Oregon State University." (Citations omitted)

This Court is bound by the ruling in Federal Court Case No.75-497. Plaintiff's recourse as to those issues decided adversely to him is by appeal, not by filing a new lawsuit in a different forum

IT IS HEREBY ORDERED AND ADJUDGED that the Motion for Summary Judgment in favor of defendants be and the same is granted.

DATED September 2,1977.

Phillip J. Roth
Judge

JUDGMENT AND MANDATE BELOW

STATE OF OREGON

COURT OF APPEALS
(April 16,1981)

MICHAEL PAPADOPOULOS, Appellant,	) No. CA 15227) JUDGMENT &
vs.	) MANDATE
OREGON STATE BOARD OF HIGHER EDUCATION, Respondent	) Appeal from Marion) County Circuit) Court No.70049

This cause having come on to be heard on appeal and having been duly submitted and considered, and petition for review having been denied by the Supreme Court on March 31,1981: IT IS HEREBY ADJUDGED AND DECLARED that the decision entered below in this cause is affirmed as modified and remanded for entry of an amended judgment consistent with this opinion.

The cause is remanded below for entry of an appropriate order in conformity with the opinion and order of the court entered October 13,1980.

IT IS FURTHER ORDERED that appellant recover from defendant costs and disbursements in this Court taxed at $559.

STATE OF OREGON

SUPREME COURT
(March 31,1981)

RE: Papadopoulos v. Oregon State Board of Higher Education, CA 15227; SC 27569

With Justices Linde and Tanzer not participating, the Supreme Court today denied appellant's Petition for Review in the above-entitled matter.

This letter constitutes the order of the Supreme Court denying the petition.

_____
Clerk

STATE OF OREGON

COURT OF APPEALS
(filed May 28,1981)

MICHAEL PAPADOPOULOS, *Plaintiff-Appellant,* vs. OREGON STATE BOARD OF HIGHER EDUCATION, *Defendant-Appellee.*	No. CA 15227 NOTICE OF APPEAL to the SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Michael Papadopoulos, the above-named appellant,

appeals to the Supreme Court of the United States from the final judgment of the Court of Appeals of the State of Oregon, entered in this case on October 13,1980. The Supreme Court of the State of Oregon, which is the highest court of this State in which a decision could be had, denied review on March 31,1981.

This appeal is taken pursuant to 28 USC Sections 1257(2) and 2103.

sgd. Michael Papadopoulos
Acting for himself

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